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HISTORICAL TREATISE

ON THE

FEUDAL LAW,

AND THE

CONSTITUTION AND LAWS

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ENGLAND.

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HISTORICAL TREATISE

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FEDERAL LAW

AND THE

CONSTITUTION AND LAWS

OF

ENGLAND.

Vol

LECTURES
ON THE
CONSTITUTION AND LAWS
OF
ENGLAND:
WITH A COMMENTARY ON
MAGNA CHARTA,
AND ILLUSTRATIONS OF MANY
OF THE
ENGLISH STATUTES.

BY THE LATE
FRANCIS STOUGHTON SULLIVAN, LL. D.
Royal Professor of Common Law in the UNIVERSITY of DUBLIN.

THE SECOND EDITION.

To which AUTHORITIES are added, and a DISCOURSE
is prefixed, concerning the LAWS and GOVERNMENT
of ENGLAND.

By GILBERT STUART, LL. D.

L O N D O N:

Printed for EDWARD and CHARLES DILLY in the Poultry; and
JOSEPH JOHNSON in St. Paul's Church-yard.

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TO THE RIGHT HONOURABLE
FREDERICK LORD NORTH.

KNIGHT OF THE MOST NOBLE ORDER OF THE GARTER,

FIRST LORD OF THE TREASURY,

CHANCELLOR OF THE EXCHEQUER,

A N D

CHANCELLOR OF THE UNIVERSITY OF OXFORD,

MY LORD,

I AM ambitious of giving dignity to this Work by inscribing it to your Lordship; and I conceive that it has a natural claim to your protection. It regards those laws and that constitution which, at a most critical period, you were called to defend; and of which the important purposes are the security and the happiness of a free people.

IN this illustrious rank which divides your cares between prerogative and liberty, and in which you support the lustre of the Crown, while you guard the independence

independence of the subject ; the greatest occasions are afforded to distinguish the generosity of public virtue, and to employ a capacity enlarged alike by reflection and experience.

BUT it does not become me to say with what honour to yourself, and with what advantages to the nation, you sustain the arduous charge of government. To posterity, which will not be suspected of flattery, it must be left to celebrate the merits of an Administration, too vigorous to yield under difficulties, and of which the glory has increased with danger.

I am, with the greatest respect,

MY LORD,

Your Lordship's

Most obedient,

And most humble servant,

GILBERT STUART.

A D V E R T I S E M E N T.

THE following LECTURES were delivered in the University of DUBLIN, and procured a very high Reputation to their Author. The Researches they contain into the Nature and History of the FEUDAL LAWS, were esteemed extensive and ingenious; and the Description they exhibit of the ENGLISH CONSTITUTION, will be allowed to be particularly interesting. These Advantages have occasioned their Publication. It was thought, that Papers, which had done so much Honour to DR. SULLIVAN, when alive, ought to illustrate his Memory; and that they might prove of Use to the present Age, and to Posterity.

THE Authorities assigned for DR SULLIVAN's Opinions and Reasonings are furnished by the EDITOR. They are not, perhaps, in every Instance those to which he himself would have appealed. This could not have been expected. They are such, notwithstanding, as will assist the Student; and the Preliminary DISCOURSE, it is hoped, will not be thought an useless or improper Addition to his LECTURES. It will be a Pleasure to the EDITOR to reflect that he has endeavoured to pay a Tribute of Respect to the Writings of a virtuous Man and an ingenious Lawyer, whom an immature Death had ravished from his Friends and from Society.

THE HISTORY OF THE

The history of the city of London, from its first foundation to the present time, is a subject of great interest and importance. It is a subject which has attracted the attention of many writers, and has been the subject of many valuable works. The history of London is a subject which is of great interest to all who are interested in the history of the British Empire. It is a subject which is of great importance to all who are interested in the history of the world. The history of London is a subject which is of great interest to all who are interested in the history of the British Empire. It is a subject which is of great importance to all who are interested in the history of the world.

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From the Press of the London Printing Office

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A D I S-

A
DISCOURSE
CONCERNING THE
LAWS AND GOVERNMENT
OF
ENGLAND.

THE last conquest attempted under the Roman Republic was that of Britain. Julius Cæsar, on the pretence that its states had given assistance to the Gauls, but chiefly from a motive of glory, carried the Roman Eagles into a country from which he was to retreat with disgrace. It required a length of time, and a succession of able Proconsuls to reduce to subjection Communities of fierce and independent warriors; and policy effected what could not be operated by arms. The Britains were debauched into a resemblance with a most corrupted people. They renounced the fatigues of war for the blandishments of peace. They forsook their huts for palaces; affected a costliness of living, and gave way to a seducing voluptuousness. They sunk into an abject debasement, without having run that career of greatness, which, in general, precedes the decline of nations; and, when they were trained to an oppressive yoke, the Romans found it necessary to abandon them. The impression which the barbarous tribes had made upon the Empire required the presence of the distant legions ¹.

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¹. Cæsar de bell. Gal. lib. 4. c. 18. Tacit. vit. Agric. Dion Cassius, vit. Sever.

The liberty which the Romans, on their departure, presented to the Britains, could not be enjoyed by them. Timid and dastardly, they fled before the Picts and Scots, and allowed their country to be ravaged by a cruel and undisciplined enemy. Amidst the suggestions of their fear, they forgot every principle of policy and of prudence; they called to their defence a foreign valour. The Saxons were invited to fight their battles; but they acted not long as protectors. They were allured by the prospect of completing a settlement in this island; and the total ruin of its inhabitants was projected. Despair gave a temporary vigour and union to the Britains. They were unable, however, to resist a people, accustomed to victory, and directed by experienced commanders. The valiant and magnanimous fell by the sword; the ignoble submitted to an ignominious servitude: Wales afforded a retreat to some; and others found shelter in Armorica ².

But, if the Saxon conquest was ruinous to the Britains, it was yet attended with consequences which were lasting and important. The fun of liberty revisited the island, and displayed itself with uncommon lustre. The Saxons, independent in their original seats, submitted not to tyrants in their new situation. They laid the foundation of a political fabric, the most valuable that has, at any time, appeared among men; and which, though shaken by violent revolutions, a train of fortunate circumstances has continued down to the present times. Fluctuations have taken place between prerogative and liberty; but, accident and wisdom have still conspired to preserve us from the fate of the other kingdoms of Europe.

During

². Bede, lib. i.

During the existence, however, of the Heptarchy, the Saxons seem to have departed little from their original condition of Society. The ferocious picture which Tacitus has drawn of the Germans, is, with a few exceptions, characteristic of them. If we admire their heroism, we are shocked with their cruelty ; and if we are in love with their democratical maxims, we must sometimes regret their contempt of justice and of order. The most important innovation introduced into their manners during this æra was their conversion to christianity. But their acquaintance with this mode of faith failed to be productive of beneficial consequences. As they received it from the corrupted source of the Church of Rome, it involved them in endless and idle disputes. It detracted from the vigour of their understanding, by turning their attention from civil precautions, and the arts of policy, to the relics of saints, and the severities of religious discipline. The power derived from it intoxicated ecclesiastics : They presumed to interfere in affairs of state ; and, a foundation seemed already to be laid for subjecting the island to the dominion of the Roman Pontiff 3.

When the Saxon kingdoms were consolidated into one state under Egbert, improvements were made in civility and knowledge. The incursions of the Danes, and the disorders resulting from them, called forth the ability and the wisdom of the Anglo-Saxon Princes. Alfred, notwithstanding the other important transactions of his reign, found leisure to frame into a code the laws of his predecessors, and those Germanic customs which had retained their influence. King Edgar has likewise come down to us with the character of an able legislator. The establishment of the Danes in England gave occasion to new usages and new laws ; but these were neither many, nor considerable.

3. Bede, lib. 3. and 5.

derable 4. The ability of Canute did not allow him to make distinctions between his Danish and his English subjects; and the sceptre was not long in returning to a prince of the Saxon line. No Monarch was ever more acceptable to a State than Edward the Confessor; and, though he had rather the qualities of a saint than those of a king, his laws have been highly extolled. They were strenuously contended for during the administration of the earlier Norman princes; they kept their ground in opposition to the clergy and the imperial institutions; and they furnished the foundation of what is termed the Common Law of England 5.

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4. The division of laws, during the Anglo-Saxon period, into West-Saxon-law, Mercian-law and Dane-law, was not of any importance. These differed not essentially from one another. "Our Saxons, says Sir Henry Spelman, though divided into many kingdoms, yet were they all one in effect, in manners, laws and language: So that the breaking of their government into many kingdoms, or the reuniting of their kingdoms into a monarchy, wrought little or no change amongst them touching laws. For, though we talk of the *West-Saxon-law*, the *Mercian-law* and the *Dane-law*, whereby the west parts of *England*, the middle parts, and those of *Norfolk*, *Suffolk* and the north, were severally governed; yet held they all an uniformity in substance, differing rather in their *mulets* than in their *canes*; that is, in the quantity of fines and amerciaments, than in the course and frame of justice." *Relig. Spelm.* p. 49.

5. King Edward's laws were compiled from those of former princes, and abolished any little peculiarities which distinguished the West-Saxon, Mercian and Danish laws, subjecting the whole kingdom to a common law. His code, accordingly, was termed *lex Anglia*, or *lex terræ*. No correct copy of it has descended to us. Those regulations, which pass under his name in the editions of the Saxon-laws by Lambard and Wilkins, have evidently some interpolations. Traces of them are to be seen in Hoveden and Knyghton; and remains of them are likewise to be found in the laws of William I. From the time of this Prince to that of King John, they continued, with the addition of some Norman laws and customs, the law of the land. *Præcipimus*, says William, *ut omnes habeant et teneant leges Edwardi regis in omnibus rebus, adauctis his quas constituimus ad utilitatem Anglorum.*

Leg.

In no portion of the Anglo-Saxon period does the power of the Sovereign appear to have been exorbitant or formidable. The enactment of Laws, and the supreme sway in all matters, whether civil or ecclesiastical, were vested in the *Wittenagemot*, or great National Assembly ⁶. This council consisted of King, Lords, and Commons, and exhibited a species of government, of which political liberty was the necessary consequence ; as its component parts were mutually a check to one another. The free condition of the northern nations, and the peculiarity of their situation when they had made conquests, gave rise to this valuable scheme of administration, and taught the politicians of Europe what was unknown to antiquity, a distinction between despotism and monarchy.

The executive power remained with the crown ; but it was the united assent of the three estates which constituted the legislature. The Lords were spiritual as well as temporal ; for notwithstanding that the Ecclesiastics preached humility, and the contempt of private interest, they had been seized with ambition and the love of superiority ⁷. The people exercised an
authority

Leg. Guliel. ap. Wilkins, p. 229. By the influence of the Barons under the last Prince, they were drawn up in the form of *Magna Charta*. For the *great charter* was not what some partial writers have represented it, a concession of privileges extorted by violence, but a declaration of the principal grounds of the *antient* and fundamental laws of England, and a correction of the defects of the common law. See *Lord Coke 2 Inst.* and *Lord Lyttelton's hist. of Henry II. vol. I. p. 42. 526.*

6. *Wittenagemot*, imports a council of wise men ; the Saxon word *witta* signifying a wise man ; and the British word *gemot* expressing a synod or council. During the Heptarchy, each kingdom had its *Wittenagemot*.

7. The lay lords were the earls, thanes, and other nobility of the kingdom. The spiritual lords were the bishops and dignitaries of the church, whose possessions were held in Frankalmoigne. After the conquest, they were subjected to military

authority that was important and ample. The counties appeared by their knights, and the cities and boroughs by their citizens and burgesſes; the Commons, as at this day conſtituted, being included under the appellation of the *wites* or *ſapientes*, who are always mentioned as a part of the Anglo-Saxon parliament ⁸. The aſſertors of prerogative, indeed, have affirmed

litary ſervice and held by barony. What may ſeem extraordinary, Abbeſſes were alſo in uſe to ſit in the Saxon Wittenagemots. In Wightred's great council at Beconcelſd, *anno* 694. the Abbeſſes ſat and deliberated, and ſeveral of them ſubſcribed the decrees made in it. *Spel. conc. vol. I.* The abeſſes appeared alſo in Ethelwolf's parliament at Wincheſter *anno* 855. *Ingulph, edit. Savil.* 862. And king Edward's charter to the abbay of Croyland was ſubſcribed by an abbeſſ. Even in the time of Henry III. and in that of Edward I. it appears that four abbeſſes were ſummoned to parliament; thoſe of Shaftſbury, Berking, St. Mary of Wincheſter, and of Wilton. *Tit. hon. p. 729. and Whitelock's notes upon the king's writ for chooſing members of Parliament, vol. I. p. 479. 480.*

8. The preambles of the Saxon laws expreſs an anxiety to pleaſe the people, and allude to their conſent in enacting them. The laws of king Ina begin thus: *Ego Ina Dei gratia Occiduorum Saxonum Rex, cum conſilio et cum doctrina Cenredeæ patris mei, et Heddeæ Epifcopi mei, et cum omnibus meis ſenatoribus, et ſenioribus SAPIENTIBUS POPULI MEI, et multa etiam ſocietate miniſtrorum Dei, conſultabam de ſalute animæ noſtræ, et de fundamento regni noſtri, ut juſtæ leges, et juſta ſtatuta per ditionem noſtram ſtabilita et conſtituta eſſent, ut nullus ſenator nec ſubditus noſter poſt hæc has noſtras leges infringeret.* See *LL. Anglo-Saxon, ap. Wilkins, p. 14.* The preambles to the laws of the other princes are nearly ſimilar; and thoſe of Edgar, Ethelred and Canute, may ſerve as additional examples. 1. *Leges Eadgari regis. Hoc et inſtitutum quod Eadgarus cum SAPIENTUM SUORUM conſilio inſtituit in gloriam Dei, et ſibi ipſi in dignitatem regiam, et in utilitatem omni populo ſuo.* 2. *Leges Æthelredi regis. Hoc eſt conſilium quod Æthelredus rex, et SAPIENTES EJUS conſultaverunt ad emendationem pacis omni populo Wodſtoci in regione Merciorum, ſecundum Angliæ leges.* 3. *Leges Cnuti regis. Hoc eſt conſilium quod Cnutus rex, totius Angliæ et Danorum et Norwegorum rex, cum SAPIENTUM SUORUM conſilio ſancivit, in laudem Dei, et ſibi ipſi in ornaumentum regium, et ad utilitatem populi; et hoc erat ſacris natalibus domini noſtri Wintoniæ.* See *Wilkins, p. 76. 102. 126.*

In the 8th law of Edward the Confefſor we read, *Hæc conceſſa ſunt a rege, baronibus et POPULO*; and in his 35th law we have the following words: *Hoc enim factum*

ed that these were judges or men skilled in the law; but this opinion

factum fuit per COMMUNE CONSILIUM et ASSENSUM omnium episcoporum, principum, procerum, comitum, et omnium SAPIENTUM seniorum et POPULORUM totius regni, et per praeceptum regis Ine praedicti. See Wilkins, p. 198. The laws of Edward are, I know, to be read with distrust; but they are allowed to contain genuine relics of that prince; and, in the present case, there seems no reason for suspicion. Their appeal of consequence to the assent of the people must be allowed to be of authority. For, if such assent was not known and believed in that age, how is it possible that they could appeal to it? The advocates for the late origin of the house of commons will not surely suppose, that the Confessor alluded prophetically to transactions which were not to happen till the reigns of Henry III. and Edward I.

In the *Mirroir de Justices*, it is expressly said, that no king, during the Saxon times, could change his money, nor enhance nor impair it, nor make any money but of silver, without the assent of the Lords and all the COMMONS. Part of this book is conceived by Sir Edward Coke to have been written before the conquest; and additions were made to it by Andrew Horn in the reign of Edward I. from old MSS. the authors of which must have seen ancient rolls and records. Matter, also, from more exceptionable materials, it is to be thought, was superadded by him. The book is notwithstanding of considerable weight and authority. *Mirroir des Justices*, cap. 1. sect. 3. *Atkyns on the power of parliament.*

Concerning the high antiquity of the commons, Sir Edward Coke is clear and explicit; and he has founded chiefly his opinion on the ancient tract, which bears this title: *Modus quomodo parliamentum regis Angliæ et ANGLORUM SUORUM, tenebatur TEMPORIBUS REGIS EDWARDI, filii REGIS Ethelredi, qui modus recitatus fuit per discretiores regni coram Willielmo duce Normanniæ conquestore et rege Angliæ, ipso conquestore hoc præcipiente, et per ipsum approbatus, et suis temporibus et temporibus successorum suorum regum Angliæ usitatus.* Other authors beside Lord Coke have paid great respect to this treatise. It is to be acknowledged, however, that Mr Selden has demonstrated that this tract could not possibly be of the age of the Confessor, from its employing terms which were not in use till long after. But this does not wholly derogate from its force as to the point in question. For, allowing it to have been written in the reign of Edward III. the period which, with great probability, some writers have assigned to it, it yet proves that the sense of that period was full and strong with regard to the antiquity of the constitution, as consisting of king, lords and commons; a circumstance which must have great weight in opposition to those, who would make us believe, that our constitution,

as

opinion they support by very exceptionable evidence 9: And it has

as so formed, was unknown till the times of Henry III. and Edward I. 4 *Institute*, p. 2. 12. *Selden, tit. hon. p. 739. 743.*

“ In the time of king Canutus, says Whitelocke, to a charter then graunted to the monastery of St. Edmond’s Bury (probably in a publique councill) after the subscriptions of the queen and dukes, followes, *I Oslaus, KNIGHT, I Thored, KNIGHT, I Thurkell, KNIGHT*, and so of others. How many these were, or how for severall counties, doth not appear; nor in that parlement of the same king (for so is testified by the discription of it) where it is sayd, that *the king calling all the prælats of his kingdome, and the nobles, and great men to his parlement*, there were present bishops, abbots, dukes, earles, *with many MILITIBUS*, butte the certain number is not extant; nor of those which are mentioned in the parlement of Edward the Confessor, where after the king, queen, archbishops, bishops, abbots, king’s chapleins, Thaines, KNIGHTS are reckoned in that parlement.” *Notes upon the king’s writ*, vol. 1. p. 437.

Lambard, Dugdale, and other antiquaries, produce a very strong evidence of the antiquity of the representation of boroughs, by evincing, “ That in every quarter of the realm, a great many boroughs do yet send burgessees to parliament, which are nevertheless so ancient, and so long since decayed, and gone to nought, that it cannot be shewed that they have been of any reputation at any time since the Conquest; and much less that they have obtained this privilege by the grant of any king succeeding the same. So that the interest which they have in parliament groweth by an ancient usage before the Conquest, whereof they cannot shew any beginning.” *Lambard Archeion*, p. 256. 257. *Coke Epist. 9. Rep. Dugdale, Jurid. p. 15.*

This matter receives confirmation from what we are told of the *boroughs of ancient demesne*. “ These, says Whitelocke, were tenants of the demesne lands of William I. and of Edward the Confessor; who (to the end that they might not be hindered from their business of husbandry of the king’s lands) had many privileges, whereof one was, that they should not be compelled to serve in parliament. Another was, that they should not contribute to the wages of KNIGHTS OF THE SHIRE. Which privileges they still enjoy, and had their beginning in the times of William I. and of the Confessor, whose tenants they first were, as appears in the book of Domesday, and is a strong proof, that KNIGHTS and BURGESSES were then in parliament.” *Notes upon the Kings Writ*, vol. II. p. 139.

See also the 22d note to the present tract.

9. The law was not then a particular profession.

has been conjectured, with no measure of propriety, by some compromising writers, that all the more considerable proprietors of land had a title, without any election, to give their votes in the Wittenagemot ¹⁰.

In inferior assemblies, and in the forms of judicial proceedings, the marks are also to be traced of the power of the people, and of a limited administration. The hundred and county courts were admirably calculated for the protection of the subject. They were composed of *freeholders*, who were bound, under a penalty, to assemble at stated times; and who, with the hundreder, earl and bishop, gave decision in all matters of civil, criminal, or ecclesiastical import. A very powerful obstruction was thus created to the oppressions of the great. And, in the institution of a *jury*, our ancestors possessed a bulwark, the most efficacious and noble that human wisdom has ever devised for the security of the persons and possessions of men ¹¹.

b

Nor

¹⁰. On the following record in the register of Ely, this notion seems to be founded. *Abbas Wulfricus habuit fratrem, Guthmundum vocabulo; cui filiam potentis viri in matrimonium conjungi paraverat; sed quoniam ille XL. hidarum terræ dominium minus obtineret, licet nobilis esset, inter procures TUNC nuncupari non potuit.* It is somewhat remarkable, that Mr Hume is among those, who, resting on this foundation, would make us conceive, that a person who had 40 hides of land, could, without being noble, give his voice in the Wittenagemot. *Hist. of Eng. vol. I. p. 145.* The passage, however, properly understood, serves to shew, that, in the course of time, the attendance of the Nobles in parliament, having been deemed an expensive service, a law was made to relieve those of them from it who were not possessed of 40 hides of land. The reader may consult *hist. Eliens. c. 36. 40. ap. Gale*, the authority appealed to by Mr Hume.

¹¹. It is perhaps impossible to ascertain the era of this invaluable institution. It loses itself in a distant antiquity. The Saxon laws mention it as a known invention. See *L.L. Ethelr. c. 4. Senat. Consult. de Mont. Wal. c. 3. ap. Wilkins.* See also *Nicolson, Præfat. ad Leg. Anglo-Sax. Spelm: Gloss. and Coke's 1st Institute.* Olaus Wormius traces it to a remote age among the Danes;

Nor was the condition of those times so entirely destitute of grandeur as some historians have been fond to assert. Even in the age of Tacitus, London was a port not unknown to navigators and traders ¹²; and we have the authority of Bede, that England abounded at an early period with cities which were wealthy and populous ¹³. Alfred was particularly attentive to encourage industry, trade and manufactures; and even imported the luxuries of life from the most distant countries ¹⁴. It was a law of Athelstane, that the merchant, who had performed at his own expence three long and hazardous voyages, should be invested with nobility ¹⁵. Civility and knowledge, commerce and wealth increased under Edgar, whose ability and affable manners allured many foreigners to his court; and affairs did not degenerate, nor was England less respectable under the peaceful and fortunate administration of Edward the Confessor.

But the beautiful pre-eminence on the side of the people, enjoyed during the Saxon times, was soon to be violated. The invasion of the duke of Normandy was about to introduce sanguinary

Danes; and Stiernhook among the Swedes. *Monument. Dan., lib. 1. c. 10. De Jure Sueon. et Goth. vetusto. c. 4.*

¹². Annal. lib. 14. c. 33. *Copia negotiatorum et commeatum maxime celebre.* The city of London in the Danish times was able to pay L. 11,000 as its proportion of L. 70,000, a tax then imposed on the nation. After, in the life of Alfred, refers to above 120 cities, boroughs and villages.

¹³. Lib. 1. See also Holingh. Chron. p. 192.

¹⁴. Spelman, life of Alfred, b. 2. p. 28. Malmesb. lib. 2. c. 4. A writer in Du Chefne having occasion to mention the first return of duke William to Normandy, after his invasion of England, has the following passage: *Attulit quantum ex ditioe trium Galliarum vix colligeretur argentum atque aurum: Chari metalli abundantia multipliciter Gallias terra illa [Anglia] vincit.* *Gest. Gul. Conques.* p. 210.

¹⁵. LL. Anglo-Saxon. ap. Wilkins, p. 71.

guinary and oppressive times. We must not, however, with a multitude of authors, be deceived into the opinion, that this warrior and statesman achieved a *conquest* over the constitution and the people of England. He made effectual by arms his right of succession to Edward; but he received the crown with all its inherent properties. He took the oath which had been prescribed to the Saxon princes; he acknowledged himself to be equally under restraint and limitation; and he engaged to preserve the immunities of the church, and to act according to the laws. The victory he obtained at Hastings was over the person of Harold, and not over the rights of the nation¹⁶.

His

16. The Confessor dying without issue, the competitors for the crown were Edgar Atheling, Harold, and duke William. The first had not capacity to sway the sceptre; and the succession of kings was not yet directed by very regular maxims. Harold was a subject, and in possession of no legal claim. William was related to Edward, and urged the destination of that prince to succeed him. On these grounds he invaded England; and by opposing Harold, he meant to secure what was his right of succession. His victory accordingly gave him the capacity of a successor, and not of a conqueror. That the quarrel was personal with Harold may be even conceived from the circumstance that duke William offered to decide their dispute by single combat. *Hale, hist. of the com. law, ch. v. Cook, argument. antinorm.*

With regard to William's right of succession, the best account appears to be that which is found in Ingulphus, William of Poitiers, William Gemetenfis, and Ordericus Vitalis, who were all of them his contemporaries. These authors inform us, that king Edward sent Harold into Normandy to assure duke William of his having destined him to be his successor to the crown of England; a destination which he had before observed to him by Robert Archbishop of Canterbury; and which appears to have been made with the consent of the national council. And of this relation there remains a very curious and decisive confirmation. It is a tapestry found at Bayeux, and supposed to be work of Matilda the wife of duke William, and of the ladies of her court, in which Harold is represented on his embassy. See a description of this tapestry by Smart Lethieullier, Esq; ap. Du Carrel's *Anglo-Norman antiquities*. It is surprising, when these particulars are considered, that Mr

Hume

His accession, at the same time, it will be allowed, was a source of inquietude and confusion. Dominion is ever consequent on property ; and the forfeited estates of the nobility and the landed proprietors who had assisted Harold, or who had afterwards joined in insurrections, having been bestowed by him on his officers ; and the high rank of many of these requiring very ample retributions, a great proportion of territory was necessarily vested in the hands of a few. Nor was it favourable to the spirit of democracy, that the donations of William were governed by the more extended notions of the feudal law.

This polity, which was common to the northern tribes, had not been unknown to our Saxon ancestors ; but, though they were familiar with grants, which were precarious, or which endured for a term of years, or during the life of the feudatory, they had seen few examples of the perpetuity of the fief. They had not been accustomed to the last step of the feudal progress ; but a tendency to its establishment was observable among them ; and, if the invasion of William had never taken place, the institutions of this law had yet arrived at their highest point. He only hastened what the course of time was about to produce by slow degrees : It was a result of his administration, that, before the

Hume should have given his sanction to the opinion that William's right was entirely by war, and that he should have conceived that those who refuse to this prince the title of *Conqueror* should rest solely or chiefly on the pretence that the word *conqueror* is in old books and records applied to such as make an acquisition of territory by any means. *Hist. of Eng. vol. 1. p. 200.* It is true, that Sir Henry Spelman and other antiquaries have shown, that *conquestus* and *conquisitio* were in the age of duke William synonymous with *acquisitio* ; but it is no less true, that the authors who refuse to duke William the title of Conqueror, rest on much superior evidence. It is not with pleasure that I differ from this great authority ; but, no man has a title to enquire who will not think for himself ; and the most perfect productions of human wit have their errors and their blemishes.

the end of the reign of Henry II. fiefs, in their more enlarged condition, had spread themselves over England ¹⁷.

This plan of political law, which had been propitious to liberty and conquest in its rise, was prejudicial to both in its decline ; and the same institutions, which in one situation, conducted to greatness, led the way in another to confusion and anarchy ¹⁸. The advantages which distinguished their earlier state, were unknown when they had attained the ultimate step of their progress. When fiefs had become hereditary, the association of the chief and the retainer, or the lord and his vassal, had no longer for its support, any other tie than that of land ¹⁹ ; and, if the possessor of a fief was less attached to his followers, he was less dependent on, and less connected with his prince. The system had lost the circumstances, which formerly had fitted it so admirably for war ; and the few regulations it included with regard to peace and domestic policy, were rather calculated for the narrow circle of a nascent community, than for the complicated fabric of an extensive empire..

The exorbitant grants, which it was necessary that duke William should make, the full establishment of the perpetuity of the fief, and the consequent investment of offices of rank and of dignity in particular families, introduced all the disorders of aristocracy. The most princely dominion was in general claimed and exercised by the great ²⁰. They assumed the right of declaring war
against

17. See farther, an Historical Dissertation concerning the antiquity of the English constitution. Part 2.

18. Ibid.

19. Ibid.

20. It is a very curious fact, that even some of the Anglo-Saxon nobles had all the prerogatives of earls-palatine. Alfred, we are told, put to death one of his judges

against each other of their private authority ; they coined money ; and they affected to exert without appeal every species of jurisdiction. But while they disputed in the field the prize of military glory, or vied in displays of magnificence and grandeur, their tenants and vassals were oppressed to supply their necessities ; and, amidst the unbounded rapine and licentiousness which arose, no legal protection was afforded to individuals²¹. There was no safety for the helpless but in associations with the powerful ; and to these they paid attention and service. The tribunals of justice became corrupted ; and decisions were publicly bought from the judges. New sources of oppression were thought of ; and none were infamous enough to be rejected. The feudal casualties were exacted with the most rigorous severity ; and, while the kingdom appeared to be divided into a thousand principalities, the people were nearly debased into a state of servility.

On a superficial view, one would be apt to imagine, that, in regard to competition, the nobles of those times were considerably an overmatch for the prince. But Barons, whose chief recommendations were the military virtues, who were haughty and independent, and often inflamed against each other with the fiercest animosity, could not always act in a body, or by fixed and determined maxims. It was not so with the sovereign :

The

judges for having passed sentence on a malefactor for an offence which had been committed *where the king's writ did not pass*. *Miroir de Justices*, ch. v. And in Selden we meet with earls who had entirely the civil and criminal jurisdiction in their own territories. *Tit. Hon. part 2. ch. v.* If there were no other proofs than these, they would be sufficient to evince the reality of fiefs among the Anglo-Saxons.

21. Madox, hist. of Excheq. *Erant in Anglia quodammodo*, says an old writer concerning the age of Stephen, *tot reges vel potius tyranni, quot domini Castellorum. Gul. Neubrigens.*

The master of operations, which depended on himself, he could speculate in silence, and watch the opportunities of action. The advantages he derived from his situation were powerful. Not to mention his prerogatives and his revenue; the returns of feudal service reminded the nobility of their subjection to him; and the inferior orders of men, regarding these as their immediate oppressors, looked up to him as to their guardian.

Amidst the lawless confusion introduced by the struggles between regal and aristocratical dominion, the constitutional rights of the Commons seem to have received a temporary interruption, and to have been insulted with a temporary disregard. Their assembling in parliament grew to be less frequent and less effectual; and for a season, perhaps, was altogether suspended. But notwithstanding the disorder occasioned by these struggles, they were in time productive of effects which were beneficial to the people. For if the charter, confirming their *ancient* liberties, which was granted by Henry I. renewed by Stephen, and continued by Henry II. had remained without a due and proper force; the confederacy of the barons produced under king John and Henry III. the revival and the exercise of the most important privileges. The *MAGNA CHARTA* brought back, in some measure, the golden times of the Confessor. It appeared to the barons, that they could not expect the assistance of the people, if, in treating with John, they should only act for their own emolument; they were therefore careful that stipulations should be made in favour of general liberty. The people were considered as parties to transactions which most intimately concerned them. The feudal rigours were abated; and the privileges, claimed by the more dignified possessors of fiefs, were communicated to inferior vassals. The cities and boroughs received a confirmation of their *ancient* immunities and customs.

stoms²². Provisions were made for a proper execution of justice; and in the restraints affixed to the power of the king and the nobility, the people found protection and security.

The sovereign, no less than the nobles, was an enemy to public liberty; and yet both contributed to establish it. Stephen gave the example of a practice, which as it served to enfeeble the aristocracy, was not forgotten by his successors. In the event of the reversion to the crown of a great barony, he gave it away in different divisions; and the tenants *in capite* produced in this manner, threw naturally their influence into the scale of the commons. The partitions, also, which the extravagance of the nobility, and the failure of male-heirs, introduced into great estates, contributed to restore the democracy. It was a result, likewise, of the madness of the Crusades, that many adventurers to the east returned with more cultivated manners, and more improved notions of order and liberty; and the romantic glory of acquiring a renown there, had induced many potent barons to dispose of their possessions. The boroughs hastened to recover the flock, which they had received during the violent administrations of William and of Rufus²³; and, if charters of corporation and community were granted seldom during the reigns of Henry I. and of Stephen, they were frequent

²². *Civitas London. habeat omnes ANTIQUAS LIBERTATES et LIBERAS CONSUE- TUDINES SUAS tam per terras quam per aquas. Præterea volumus et concedimus quod OMNES ALIÆ CIVITATES et BURGI et VILLAE et PORTUS habeant OMNES LIBERTATES, et LIBERAS CONSUE- TUDINES SUAS. Magna charta ap. Blackstone, Law Tracts, vol. III. p. 21.*

²³. They had suffered considerably, even from the time of the Confessor to that of Domesday-book. Authors ought therefore to be cautious in reasoning back from that monument to the Saxon period. It is a pity, that the survey of the kingdom taken by Alfred did not yet remain. The comparison of it with that of William would lead to very curious discoveries.

quent under Henry II. Richard I. king John, and Henry III. During the sovereignty, accordingly, of the last, and during that of Edward I. the acquisitions secured by the Commons appeared so considerable, that their assembling in parliament became a matter of greater regularity, and they rose to their ancient importance from the disorder into which they had been thrown during agitated and turbulent times.

The 49th year of Henry III. and the 23d year of Edward I. which so many writers consider as the dates of the establishment of the Commons, were, of consequence, nothing more than memorable epochs in their history²⁴.

c

Under

24. The first summons of knights extant on record is supposed to be in the 49th of Henry III. But this, though it were true, does not prove that knights were not known till that time. The writ does not say so; nor can it be gathered from it, that *knights of the shire* were then *newly* established. If there remained, indeed, an uniform series of records from the earliest times, in which there was no mention of *knights* till the age of Henry III. there might thence arise a strong argument against their antiquity. But this is not the case; and it happens, that in the 15th year of king John, there is a writ to the sheriff to summon *FOUR knights of the county*; 15. *Jo. Rs. rot. claus. pt. 2. m. 7. dorso. 4 discretos milites, de comitatu suo, ad loquendum nobiscum*. There is also similar evidence, that in the 32d and 42d years of Henry III. *knights* made their appearance in parliament. *Whitelocke, Notes, vol. I. 438. vol. II. 120*. In the close roll, also, of the 38th year of Henry III. there is extant a writ of summons directed to the sheriffs of Bedfordshire and Buckinghamshire, requiring *TWO knights* to be sent for each of these counties. *Lytelton, Hist. Henry II. notes to the 2d book, p. 70. 79*. In ancient times, it was usual to summon sometimes *FOUR knights*, sometimes *THREE*, sometimes *TWO*, and even sometimes *ONE knight*. But from the reign of Edward III. it has been the constant practice for the sheriff to return *TWO knights* for each county. *Whitelocke, vol. I. 439*.

The first summons directed to the sheriff for the election of *citizens* and *burgesses*, is supposed to be in the 23d of Edward I. But in the sixth year of king John, says *Whitelocke*, there is extant on record a writ to the sheriff, which mentions "Bishops, earls, barons, and *all our faithful people in England*; by whose assent, lawes were then made." 6. *Jo. regis, rot. claus. m. 3. dors. et rot. pat. m. 2. Assensu archiepif. &c. et omnium fidelium nostrorum Angliæ. Notes on the king's*

Under Edward I. the constitution received a stability to which it was no less indebted to his military than his civil capacity.

king's writ, vol. II. p. 120. An ordinance in this year of king John, directed to all the sheriffs in England, is mentioned from the records by Sir Robert Cotton, and has these words: *Provisum est ASSENSU Archiepiscoporum, comitum, baronum, et OMNIUM FIDELIUM NOSTRORUM ANGLIAE.* Cotton. *posth. p. 15.*

In the *conventio inter regem Johannem et barones* the people are stated as parties; a circumstance which would not have happened if they had not been represented. *Hæc est conventio facta inter dominum Johannem regem Angliæ ex una parte, et Robertum filium Walteri Mareſcallum, &c. ET LIBEROS HOMINES TOTIUS REGNI ex altera parte.* Blackstone's Edition of the charters, ap. Law Tracts, vol. II. p. 39. 40. And what confirms this notion is, that we find the mayor of London and the constable of Chester in the list of those who were chosen conservators of the public liberties in consequence of the great charter. Other proofs, likewise, of the antiquity of the commons are to be found in the great charters. See Lyttelton, Hist. Henry II. Notes to the 2d book, p. 71.

It is also worthy of notice, that the 25th of Edward I. which confirms the great charter, observes, that it was made by the *common assent of all the realm*: And the 15th of Edward III. observes, that it was made *par le roy, ses piers, et la communalité de la terre.*

Nor must it be omitted, that the 5th of Richard II. has this remarkable passage: *The king doth will and command, and it is assented in the parliament, by the prelates, lords and COMMONS, that all and singular persons and commonalties, which from henceforth shall have the summons of the parliament, shall come from henceforth to the parliaments in the manner as they are bound to do, and have been accustomed within the realm of England OF OLD TIMES. And if any person of the same realm, which from henceforth shall have the said summons (be he archbishop, bishop, abbot, prior, duke, earl, baron, banneret, KNIGHT of the shire, CITIZEN of city, BURGESS of borough, or other singular person, or commonalty) do absent himself, and come not at the said summons (except he may reasonably and honestly excuse him to our lord the king) he shall be amerced, and otherwise punished, according as OF OLD TIMES hath been used to be done within the said realm in the said case. And if any sheriff of the realm be from henceforth negligent in making his returns of writs of the parliament; or that he leave out of the said returns ANY CITIES OR BOROUGH WHICH BE BOUND AND OF OLD TIME WERE WONT TO COME TO THE PARLIAMENT, he shall be amerced, or otherwise punished in the manner as was accustomed to be done in the said case in times past. Stat. 2. cap. 4.*

The

capacity. The wars and expeditions in which he engaged, involved him in immense expence ; and calling for supplies, rendered him particularly attentive to the people. The feudal force of the kingdom could not be employed by him with efficacy. In the decline of the gothic system, the nobles were not sufficiently in subjection to the prince ; and their service was limited to a narrow period. In the reign, indeed, of Henry II. a pecuniary payment had been substituted in the place of the personal

The expression “ of old time,” so often used here, must doubtless carry us farther back than the 23d of Edward I. or even the 49th of Henry III. The space of two or even three reigns does not make a period of antiquity. We do not say, that the accession of George I. was in *ancient times*.

I know well, that the expressions *commonalty*, *communitas regni*, *baronagium Angliæ*, *magnates*, *nobiles*, *proceres*, &c. have been considered as solely applicable to barons and tenants *in capite*. But one must beware of giving credit to this opinion. The great charter of king John bears to have been made *per regem, barones et liberos homines totius regni* ; a certain proof that it was not made by the king and the barons only ; yet Henry III. speaking of this parliament, calls it *baronagium Angliæ*. The *magnates* and *proceres* are said to have made the statute of Mortmain ; but it is well known, that the parliament which gave authority to this act consisted of king, lords and *Commons*. In the 35th of Edward I. the expression *cum comitibus, baronibus, proceribus, nobilibus, ac communitatibus*, evidently refers to KNIGHTS, CITIZENS and BURGESSES : And in the 14th of Edward III. *commonalty* and *Commons* are used as synonymous. See farther, *Whitelocke*, vol. II. ch. 81. *Coke*, 2d Inst. 583. *Petyt*, *Rights of the Commons*. *Atkins*, *on the power and jurisdiction of parliament*.

Mr Hume, I am sensible, strenuously asserts the late origin of the Commons ; and one would almost imagine, that his history of England had been written to prove it. His reasonings, however, on constitutional points, do not appear to me to be always decisive ; and it is with pain I observe the respect which this great man has paid to the opinions of Dr Brady ; a writer who is known to have disgraced excellent talents, by pleading the cause of a faction, and giving a varnish to tyranny.

The brevity which was necessary to this tract, has permitted me rather to hint at, than to treat the antiquity of the Commons. In a work which I hope one day to lay before the public, I shall have an opportunity of entering into it at greater length.

personal attendance of the military vassal; and the custom had prevailed of hiring foldiers of fortune. But, amidst the prevalence of private and mercenary views, the generous principles which had given solidity to the feudal fabric ²⁵. having totally decayed, and the holding by a military tenure having ceased to be considered as an honour; vassals thought of eluding the duties to which they were bound by their possessions, and granting them away in fictitious conveyances, received them back under the burden of elusory or civil donations. It even grew to be usual among tenants to refuse the pecuniary payments, or the *scutages* to which they were liable: They denied the number of their fees; they alledged that the charge demanded of them was not justified by their charters; and, while the prince was ready to march against an enemy, it was not convenient to look into records and registers. The sovereign deprived of his service, and defrauded of his revenue, and under the necessity of levying a military force, had no resource so secure or abundant as the generosity of the people ²⁶.

The admirable improvements with which Edward enriched the laws, and facilitated the preservation of domestic peace and order,

²⁵. Hist. Dissert. concerning the antiq. of the Engl. constitut. part 2.

²⁶. *Madox, Hist. of the Excheq. Bar. Angl.* The granting of supplies to the sovereign, naturally suggested to the people the petitioning for redress when under the pressure of any grievance; and the crown, where it expected much, would not naturally exercise a rigorous severity.

The term *petitioners* indeed, has, by some authors, been considered as reproachful to the *Commons*; but how a petition, as the spring of a law, could have meanness in it, is inconceivable. Even in the free age of Charlemagne, this mode of application was employed. *Baluz. capit. reg. Franc. tom. 1.* The behaving with reverence to the sovereign is very different from acting with servility. And as to the petitioning against grievances, it is to be remembered, that respectful requisitions of ancient and constitutional privileges, which had suffered invasion, are not to be considered as mean solicitations for acts of favour.

order, contributed also with the greatest efficacy to advance and secure the liberties of England. He established the limits of the different courts ; he gave a check to the insolence and encroachments of the clergy ; he abrogated all inconvenient and dangerous usages ; and the great charter, and the charter of the forest, received from him the most ample settlement²⁷.

The

27. *Conf. Cart. an. 25. Ed. I.* It is singular, that even after the times of Edward I. some writers will not allow, that the Commons were any essential branch of the legislature ; yet the writ of summons expresses in strong terms their right of assent : *Ad audiendum et faciendum et consentiendum* ; and a multitude of examples may be produced of their actually consulting and determining about peace and war and other important matters of state.

There is evidence that Edward I. called a parliament, and consulted with the Lords and Commons about the conquest of Wales ; and that on receiving information that the French King intended to invade some of his dominions in France, he summoned a parliament *ad tractand. ordinand. et faciend. cum prælatis, proceribus et aliis incolis regni quibuscumlibet, hujusmodi periculis et excogitatis malis sit. objurand.* Inserting in the writ these memorable words, *Lex justissima, provida circumspeditione stabilita : QUOD OMNES TANGIT, AB OMNIBUS APPROBETUR.*

Edward II. consulted with his PEOPLE in his first year *pro solemnitate sponsalium et coronationis* ; and in his sixth year he consulted them, *super diversis negotiis statum regni et expeditionem GUERRAE SCOTIAE specialiter tangentibus* *.

Edward III. summoned the peers and Commons in his first year to consult them, Whether they would resolve on peace or war with the Scottish king. In his sixth year, he assembled the lords and Commons, and required their advice, Whether he should undertake an expedition to the Holy Land. The lords and Commons consulted accordingly ; and while they applauded his religious and princely forwardness to the holy enterprize, advised a delay of it for that season. In his thirteenth year, the parliament assembled *avisamento prælatorum, procerum, necnon COMMUNITATIS* to advise *de expeditione GUERRAE in partibus transmarinis* ; and ordinances were made for provision of ships, arraying of men for the marches, and defence of the isle of Jersey.

* In his history of this prince, Mr Hume has the following very strange assertion : " The Commons, though now an estate in parliament, were yet of so little consideration, that their assent was never demanded." Vol. II. p. 139.

The sagacity of his precautions and policy procured to him most deservedly the name of the *English Justinian*; and it may be mentioned

Jersey. In his fortieth year, the Pope demanding the tribute of king John, the parliament assembled, where, after consultation apart, the prelates, lords and *Commons* advise the refusal of it, *although it be by the dint of the sword*.

Richard II. in the first year of his reign, advised with the peers and *Commons*, How he should best resist his enemies? In the second year, he consulted his *people* how to withstand the Scots; who had combined against him with France. In the sixth year, he consulted the parliament about the defence of the borders; his possessions beyond sea, *Ireland* and *Gascoyne*, his subjects in *Portugal*, and safe keeping of the seas; and whether he should proceed by treaty or alliance, or the duke of Lancaster by force? The lords approved the duke's intention for Portugal; and the *Commons* advised, that Thomas bishop of Norwich, having the Pope's *croiceris*, should invade France. In his fourteenth year, this prince advised with the lords and *Commons* for the war with Scotland, and would not, without their counsels, conclude a final peace with France. And the year ensuing the *Commons* interested the king to use moderation in the law of provisions, and proposed that the duke of Aquitaine should be employed to negotiate the peace with France.

With regard to the power of the *Commons* as to *judicature* in the times of which we speak, there are not wanting decisive proofs. In the reign of Edward II. the peers and *Commons* gave consent and judgment to the revocation and reversal of the sentence of banishment of the two Spencers*. In the first year of Edward III. when *Elizabeth* the widow of *Sir John de Burgo* complained in parliament, that Hugh Spencer the younger, Robert Baldock and William Cliffe his instruments, had by duress forced her to make a writing to the king, in consequence of which she was despoiled of her inheritance, sentence was given for her by the prelates, lords and *Commons*. In the 4th year of Edward III. it appears by a letter to the pope, that to the sentence given against the earl of Kent, the *Commons* were parties as well as the peers; for the king directed their proceedings in these words: *Comitibus, magnatibus, baronibus, et aliis de COMMUNITATE dicti regni ad parliamentum illud congregatis injunximus, ut super his discernere et JUDICARENT quod rationi et justicie conveniret*. When in the first year of Richard II. William Weston and John

* The share the *Commons* had in this act, Sir Robert Cotton authenticates from the parliament rolls. *Cottoni posthuma*, p. 348. Yet Mr Hume, in the most positive terms, denies that the *Commons* had any concern in it. Vol. 2. p. 140.

mentioned as a convincing proof, both of his genius, and of his having studied the welfare of his people, that, to the form into which he modelled the common law, as to the administration of common justice, the wisdom of succeeding times has not been able to add any considerable improvements²⁸.

The crown of Edward I. but not his talents, descended to Edward II. The indolence, however, and the incapacity of the last prince, joined to his absurd passion for favourites, though they rendered his reign tumultuous and unhappy, were no less favourable to the dignity of parliament, and the power of
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John Jennings were arraigned in parliament for surrendering certain forts to the king; the *Commons* were parties to the sentence against them, as appears from a writing annexed to the record. In the first year of Henry IV. although the *Commons* refer by protestation, the pronouncing the sentence of deposition against King Richard II. to the lords, yet they were equally interested in it, as is evident from the record; for there were made proctors or commissioners for the whole parliament, one bishop, one earl, one abbot, one baronet, and two knights. "And to infer, says a learned and accurate author *, that because the lords pronounced the sentence, the point of judgment should be only theirs, were as absurd as to conclude that no authority was left in any other commissioner of *oyer and terminer* than in the person of that man solely that speaketh the sentence." In the second year of Henry V. the petition of the Commons imported no less than a RIGHT to *act and assent to all things in parliament*; and the king allowed that they possessed this right.

These examples of the importance of the people are striking; and they are supported by the authority of the parliament-rolls, or by records above exception. The curious reader may see them, and other proofs to the same purpose, in the posthumous pieces of Sir Robert Cotton.

28. *Hale, hist. of the com. law, ch. vii.* It has been sometimes insisted upon, that much improvement was brought to England by the canon and civil laws. I cannot, however, but imagine, that these laws, have, on the whole, been rather attended with disadvantage. For tyrannical maxims do not suit a limited government. They may have assisted, indeed, the invention, and extended the views of some lawyers; but they have filled the heads of more with illiberal prejudices.

* Sir Robert Cotton.

of the people, than the excellent administration of Edward III. and the necessities to which he was subjected by his ambition and his prowess. A weak prince may lose the prerogatives transmitted to him ; but will never be the founder of a despotism. A high-spirited monarch, dependent for resources on his people, may carry destruction and ruin into the country of an enemy, but will not easily be induced to attack the liberty and the prosperity of his own kingdom.

The sons of Edward III. had contributed, while he lived, to his grandeur, and that of the nation ; but no sooner was he laid in his grave, than they excited commotions. The ambition of their posterity was still more pestilent and fatal. The wars between the Houses of York and Lancaster deluged England with blood. The passions of men were driven into rage and phrenzy ; and in the massacres, rather than the battles that ensued, conquest or death seemed the only alternative. But while we turn with sorrow from this bloody period of our story, our sympathy is softened by the recollection, that the contending princes brought accessions to liberty, by adding to the weight of the Commons. The favour and countenance of the people were anxiously solicited by both factions ; and their influence failed not to grow, while the means of extending it were offered, and while they were courted to seize them ²⁹.

The nation, when satiated with the calamities of civil war, thought of uniting the claims of the two hostile families. Henry VII. the heir of the House of Lancaster, was married to Elizabeth, the heiress of the House of York. This prince affected

²⁹. The reader, who is desirous of seeing proofs of the consideration of the people during the wars between the Houses of York and Lancaster, may consult Cotton's abridgment of the records ; and Bacon on the laws and government of England. Part II.

ted to be profound, and he has obtained that character. But the condition of Europe at the time in which he lived, and the situation in which he found himself, pointed out to him his strain of conduct. He was more mysterious than wise ; more prudent than enterprizing ; and more a slave to avarice than ambition. Without having intended it, he placed the grandeur of the Commons on the most solid foundation. In the liberty which he granted to the nobility of breaking their entails, he saw only the degradation of that order. The civil wars had involved them in great expence ; and the growing commerce and refinement of the times, exposed them to still greater. Their princely possessions flowed from them to give dignity to the people³⁰.

Henry VIII. had no certain character, and was actuated by no fixed and determined maxims. He had not the ability to form, nor the firmness to put into execution a deliberate scheme to overturn the liberties of his country. With less capacity than his ancestor, his reign was more splendid; and, with a more imperious temper, he had the art or the felicity to preserve the affection of his subjects. The father removed the pillar which supported the power of the nobles: The son gave a mortal blow to the influence of the clergy. In the humiliation of both, the Commons found a matter of triumph. The

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Reformation.

30. In the year 1546, there were 126 boroughs that returned members to parliament; and the greatest number of these were wealthy and populous. *Brown Willis, notit. parlam. vol. I.* In the reign of Edward VI. 23 new boroughs were summoned to send burgesses to parliament. Philip and Mary added 13 more, Elizabeth 30, James the 2 universities and 12 boroughs, Cha. I. 8 boroughs, and Cha. II. the county of Durham and 2 boroughs. *Ellys on temporal liberty.* Anciently the king might incorporate any town, and enable it to send burgesses to parliament; but this privilege remains not at present with the crown. If the king was now to venture on the creation of a parliamentary borough, it would rest with the house of commons whether they would receive the members.

Reformation, though it interrupted the progress of literature, was yet highly conducive to civil liberty. The church in losing an authority which it had never merited, and which it had often abused, sunk into a dependence on government. The supremacy returned to the sovereign to whom it originally belonged, and with whom it ought constantly to have remained. The visitation of the monasteries discovered more than the inventions of a pious fraud; vices and abuses which cannot be described, without conveying to the mind the impression of whatever is most wicked and most dishonourable: Their suppression gave encouragement to industry and to the arts; and their wealth diffused in a thousand channels, circulated through the kingdom.

The Reformation advanced under Edward VI. but it was destined that this prince should only make his appearance on the stage of public life, and give the hope of an able administration. The sway of Mary was a paroxysm of religious madness. She knew not, that when the individuals of a kingdom have agreed to adopt a new religion, it is the duty of the sovereign to give a sanction to it. The reformed were about to experience whatever cruelty the extremity of a mistaken zeal can inflict. But the fires lighted by Gardiner, Bonner, and such abominable men, brought no converts to popery. The dread of endangering the succession of Elizabeth prevented the parliament from giving a check to the obstinate malignity and the sanguinary rage of this unworthy queen; or, perhaps, the nation had scarcely recovered the astonishment into which it was thrown by the atrocity of her deeds, when, in the sixth year of her reign, superstition, peevishness, and the most selfish and unhappy passions, put an end to her life.

Elizabeth, who had learned wisdom from misfortune, attained the summit of political glory. The perilous condition of
affairs,

affairs, on her commencing to reign, required singular moderation and ability, and she exerted them. A sagacity, almost incapable of mistake, directed all her operations³¹. England grew in commerce and advantages, while the rest of Europe was agitated with contentions, and debased with the tyranny of power. Her jealousy of prerogative was corrected by her attachment to the felicity of her people; and the popularity with which she reigned is the fullest proof that she preserved inviolated all the barriers of liberty³². The reformation which the folly of her predecessor had interrupted, was compleated by her prudence.

This accomplished princess was succeeded by James VI. of Scotland. He substituted, in the place of ability, the affectation of it. The English nation received him with marks of respect which they were not to continue long. With high notions of kingly dignity, all his actions tended to degrade it; and,

31. "As for her government, says a great authority, I assure myself I shall not exceed, if I do affirm, that this part of the island never had 45 years of better times; and yet not all through the calmness of the season, but through the wisdom of her regiment." *Lord Bacon*.

32. "She loved not to be tied, but would be knit unto her people. Of 13 parliaments called during her reign, not one became abortive by unkindness; and yet not any one of them passed without subsidy granted by the people, but one wherein none was desired. And sometimes the aid was so liberal, that she refused the one half, and thanked the people for the remnant; a courtesy that rang loud abroad, to the shame of other princes. She never altered, continued, repealed, nor explained any law, otherwise than by act of parliament, whereof there are multitudes of examples in the statutes of her reign." *Nat. Bacon, Discourse on the laws and government of England, part 2.*

I do not mean to say, that Elizabeth, and the princes who preceded her, never acted against the spirit of our government. Her reign, and those of many of her predecessors, were doubtless stained with bold exertions of authority. But bold exertions of authority must not be interpreted to infer despotism in our government. We must separate the personal qualities of princes, and the principles of the constitution. The government of England, and the administrations of its chief magistrates, are very different things.

and, while his littleness rendered him contemptible at home, he became an object of ridicule abroad, from his ignorance of foreign politics. Careless in the choice of his ministers, and supremely conceited of his own wisdom, his reign brought no glory to the crown.

The great improvement, which, about this period, displayed itself in the national manners, diffused among all ranks of men very enlarged ideas concerning the nature and principles of civil government. The arts had been cultivated with uncommon success. Discoveries had been made in the most distant regions of the globe. Commerce had brought great accessions of wealth. The balance of property had turned with no equivocal direction to the side of the people.

It was not an age for fastidious and tyrannical maxims. The Commons knew all their strength, and were determined to employ it. The prince endeavoured in vain to impress them with his exorbitant notions of regal authority. Every complaint and grievance of the subject were inquired into; every suspicious and inclement act of prerogative was opposed. The doctrines of the divine right of kings, and of passive obedience, were now first heard of, and alarmed and astonished the nation. Pretensions to power, destructive of the natural and inherent privileges of humanity, and inconsistent with every principle of common sense, were asserted from the pulpit, were claimed by the sovereign. The extravagance of James awakened the thunder which was to burst on the head of his successor.

Charles I. had imbibed the same lofty conceptions of kingly power; and his character was marked by the same incapacity for real business. His situation required insinuation and address;

dress ; but he affected the utmost stateliness of demeanor. He disgusted the Commons ; he insulted the people. To the exercise of his authority, he fancied there was no limitation. Inflamed with opposition, he presumed to attack whatever was most sacred, and most valuable among men. The imprudence of Buckingham had not softened his obstinacy : His Queen was indiscreet, and he confided in her. The violent councils of Strafford precipitated his own and the ruin of his master. The religious foppery of Laud completed what the incapacity of James had begun : It was the cement of union between the friends of liberty and the sect of the Puritans. The people beheld with a fixed and a general indignation the insult and the violence which were offered to the majesty of their laws, and to their constitution. The flames of civil discord were kindled. England was torn during six years with political and religious fury. The unfortunate Charles atoned at length by his death the disorders he had occasioned. The delegates of the people pronounced him guilty of misgovernment and breach of trust. “ The pomp, says an eloquent historian, the dignity, the ceremony of this transaction, corresponded to the greatest conception that is suggested in the whole annals of human kind 33.”

Cromwel,

33. *Hume, Hist. of England, vol. V. p. 462.* This historian, the most accomplished, perhaps, who has written in modern times, has attempted to vindicate both James and Charles ; but he has done nothing more than to produce evidence to shew, that in some respects they acted from precedents of administration in former princes ; and this, if taken even in the fullest extent, is insufficient to justify them. Charles, however, it will be allowed, exceeded every violation of liberty, of which there had been any example ; and when he had consented to reduce the exorbitancy of the regal power, his conduct created a suspicion of his sincerity. But on the supposition that he did not advance his authority beyond the practice of former

Cromwel, the immediate cause of the death of Charles, and of those circumstances of censure which accompanied it, astonished at the height, to which, in the course of the civil wars, his ambition had carried him, was induced to aspire still higher. His genius was great, his fortune greater. On the abolition of monarchy, he introduced into England a military despotism, under the appellation of a common-wealth³⁴. From an inferior rank, he had risen gradually to direct the affairs of a powerful nation. Though irregular in his politics, the vigour of his conduct brought signal glory to his councils and his arms. But the fabric he had built was ill-contrived and ill-cemented; its parts were disproportioned; and it rested on no solid foundation. It began to totter during his own life. His son Richard had none of the talents of an usurper. The minds of the people united in an anxious wish for the re-establishment of the ancient constitution; and general Monke acquired the honour of the peerage, and the fame of uncommon political sagacity,

mer times, he is not therefore to be vindicated. It is no exculpation of a crime in one individual, that it has been committed by others. The advantages of a free government belonged to the people of England; and they were the proper judges, when to enforce their privileges against an invader. They might pardon in one sovereign what they would punish in another. They might overlook in Elizabeth what they did not wish to excuse in Charles. The doctrine of resistance is delicate. In a free constitution, like that of which we speak, the prince and the people will often fall into situations where they seem to encroach, or actually do so, on the rights of one another. But it is never on slight grounds that the people will be prevailed upon to take arms against their chief magistrate. After all, had England been an absolute monarchy, Was it thence proper and just that it should remain in that situation? There are rights which it is impossible that men can either lose or forfeit. No authority and no precedent, no usage and no law, can give a sanction to tyranny.

34. Lord Clarendon applies to him, with great propriety, what was said of Cinnna, *ausum eum, quæ nemo auderet bonus; perfecisse, quæ a nullo, nisi fortissimo, perfici possent.*

gacity, for forwarding an event, which it was impossible to prevent.

Charles II. never forgave the people of England for the misfortunes he himself had suffered, nor for those of his House. This monarch had quickness of parts, but possessed not that discernment which sees into the future. He entered without reflection into schemes and projects, and renounced them with the same precipitation. Though an enemy to the constitution of his country, and though in the interest of France, he was not able to produce any lasting disadvantage to the kingdom. His reign, though tumultuous, was not unfavourable to liberty. The total abolition of the military tenures and their appendages, which had place during his sovereignty, was a most important acquisition to the people: It relieved their estates from every source of legal oppression. The *habeas corpus* act, which was some years posterior to it, offered the firmest security to their persons. It produces in a court of justice the body of every prisoner; it makes known the cause of every commitment; and, if an individual has suffered confinement in opposition to the law, though at the command of the king in council, he is restored to his liberty, and has a claim of compensation for the loss and the indignity his affairs and his honour have sustained.

The clamour against popery was loud and violent during the long administration of Charles II. and yet the crown was permitted to pass to the Duke of York. This confidence, so honourable to the people, was abused by the sovereign. James II. had the zeal of a monk, not the virtue and the talents of a great king. His bigotry and his lust of power made him perpetrate the most atrocious and the most insolent acts. Violating equal-
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ly civil and religious liberty, his subjects deprived him of a throne of which he was unworthy.

In settling the crown on the prince and princess of Orange, the wisest precautions were taken, that the religion, the laws, and the liberties of England should never more be in danger of being subverted. The limits of the prerogative were defined; the extent of the freedom of the people was ascertained; and the doctrine of resisting the prince, when he should presume to encroach on the rights of the subject, was explained and illustrated 35.

From the Saxon conquest, during a long succession of ages, this fortunate island has never degenerated from liberty. In the most inclement periods of its history, it despaired not of independence. It has constantly fostered that indignant spirit which disdains all subjection to an arbitrary sway. The constitution, prospering under the shocks it received, fixed itself at the highest point of liberty that is compatible with government. May it continue its purity and vigour! and give felicity and greatness to the most distant times!

March 1775.

35. Bill of rights, toleration act, act of settlement.

L E C T U R E S

O N . T H E

L A W S O F E N G L A N D .

L E C T U R E I .

The intention and purposes of political society—Customs and manners govern men before the enactment of positive Laws—Arts and property the sources of legislation—Peculiarities attending the institutions of Lycurgus and those of Moses—In the infancy of a state, laws are few and plain—In times of civility and refinement, they are numerous and complicated—The liberty of the people, a great cause of the multiplicity of laws—The difficulty of the study of the English law—The methods which have been followed in the study of it.

SINCE every political society was originally framed for the general benefit of the several individuals of which it was composed, in order that, supported by the united strength of the whole community, each person might have that security in his life, his liberty, his property, which, unassisted in a state of nature, he could not of himself attain unto; and that, instructed by the joint counsels and wisdom of the whole body, he might so direct his actions, as to promote the public welfare, with which his own safety and interest are necessarily connected; it follows, that, in such a state, every man must, even for his own sake, in many things, sacrifice his private judgment, and his natural liberty of action, to the will of that community to which he belongs; which will, acting uniformly for the same purposes, cannot fail of producing a number of fixed rules and regulations, to serve as directions to the subjects, in such cases as are common, and frequently occur.

ACCORDINGLY, we find, there never was a state or nation, even but one degree removed from barbarity, that subsisted without some general customs, at least, which supplied the place of positive laws, by which the conduct of the several members of the society was to be governed, and for the breach of which they were liable to punishment; and in such a submission the very essence of political freedom consists. For, as M. Montesquieu very justly observes, the liberty of man in a social state, different from that in a state of nature, consisteth not in a power of acting, in all things, according to his own judgment, but in acting according thereto, in subservience to the will of the public, in being free to do all things the law prohibits not, and to omit all things the law doth not enjoin †.

HENCE, in all such infant states, the greatest respect is paid, and the highest influence allowed to those, who, either by their age and experience, or, by their application and labour, have arrived at a proficiency in the knowledge of the customs and practices prevailing in their own and neighbouring nations: *Qui mores hominum multorum vidit et urbes*, is the great eulogium of the most accomplished hero of the heroic ages.

It must be allowed, indeed, that, in societies so small that their members are, in general, contented with little more than the bare necessities of nature, a few rules will be sufficient; and every man of a tolerable capacity will, with a reasonable degree of observation, be, in some measure, qualified to be his own lawyer. But when it shall happen that arts are not only introduced, but become common among any people, when the comforts and conveniencies of life are, in the public opinion, esteemed necessities; when the industry of some, and the negligence of others, have produced a remarkable inequality in the goods of fortune; when riches hath brought forth her offspring, insolence and oppression, and when envy and avarice inflame the breasts of the indigent, it will be absolutely necessary to lay a continual restraint on such violent passions, ready at every instant to destroy the peace of society, and to tear it into pieces, and, for that purpose, to form a great number of regulations, to curb those who have created to themselves imaginary wants, and who no longer regulate their conduct by the plain dictates of rude and simple nature. And as the condition of such a nation must be perpetually changing, as new arts and gratifications will be con-

† L'Esprit des Loix, Liv. xi. ch. 3.

continually invented, as the increase of commerce will every day open a prospect of more various acquisitions, and insensibly introduce a general change of manners in the people; and, above all, as the wits of men, checked in their darling pursuits, will ever be at work to discover methods of eluding those laws which they dare not openly infringe, there must ensue a constant alteration and variation of the rules already in being, and a continual addition of new ones to answer new and unforeseen emergencies. The laws, therefore, of a nation so circumstanced, must increase to such a number, and consist of so great a variety of particulars, as to render it impossible for the generality of the subjects to be masters of them, and will oblige them to resort to those whose easy circumstances and leisure have enabled them thoroughly to comprehend and understand them; and among such a people there must be *lawyers*, although, perhaps, not formed into a distinct and separate profession, or known by that appellation.

GREAT, undoubtedly, are the inconveniencies which attend a multiplicity of laws, and very hard it seems, that all men should be obliged to obey a rule, which it is confessed the majority are incapable of perfectly knowing; but such is the natural and necessary course of things. If men will not be contented to live in a state next to absolute barbarity, if they will enjoy the conveniencies as well as the necessities of life, if they will be secured against the oppression and fraud of their fellow subjects, as well as against the violence of strangers, they must submit to and abide by the consequences. And so sensible of this necessity was the great Spartan legislator, that when he resolved his state should admit of no addition to, or alteration of his regulations, he wisely stopped up the sources from which new laws spring. Commerce, and its instrument, money, were prohibited; all arts, except those absolutely necessary, were interdicted, and the people, by constantly living and eating in public, were not only accustomed, but necessitated to content themselves with what simple nature requires. By these means (and by these only, or by others similar to these, could it be accomplished) Lycurgus gave a firmness and stability to his republic, which continued for several hundred years, until conquest introduced wealth, and its necessary attendants, which soon eat out the vitals of that singular constitution†.

THE law of Moses, likewise, was invariable, and admitted of no additions or alterations; and as, from the peculiar circumstances of the country,
and

† Plut. Vit. Lycurg.

and its situation, there was no danger of an accumulation of wealth from foreign commerce, so were the domestic regulations inimitably calculated to prevent a great inequality of circumstances, and to oblige the nation in general to a plain and simple life. All usury among the Israelites was prohibited, the lands were alienable no longer than to the year of jubilee, at which time they returned free to the original proprietor or his heirs; and, by the invariable rules of descent, and the continual dividing of estates among all the males in equal degree, every man was proprietor of some small patrimony, and consequently obliged to live in a frugal and laborious manner †. Athens, on the contrary, the most commercial and the richest city of Greece, abounded, above all others, in a multiplicity of laws, and those, for the causes already mentioned, perpetually varying and changing. Rome, while it continued a mere military state, was contented with a few, and those such as were short and plain; but when, by the conquest of Carthage, of Greece, and of Asia, floods of wealth were poured into Italy, the necessary consequences soon followed. New laws were continually made, which, being as continually eluded, of course gave birth to others. Every new conquest brought an accession of riches, and became a source of farther regulations: until, at length, they swelled to such a magnitude, as to become, in the time of Justinian, an intolerable burthen: For, to say nothing of the laws themselves, the *senatus consulta*, the *plebiscita*, the *edictum perpetuum*, and the constitutions of the emperors, which were very voluminous, the bare commentaries of the lawyers of authority amounted to three thousand volumes.

If we look around the nations that now inhabit Europe, we shall find that the same causes have constantly, every where, produced the same effect. How few, how short, how plain, and simple, were the antient laws of the Saxons, the Franks, the Burgundians, the Goths, and the Lombards, while each of them continued a plain and simple people ‖. As they increased in arts and wealth, as their kingdoms grew more powerful, either from internal peace and commerce, or by the melting of different sovereignties into one, we might see the laws gradually increase in number and in length; this arose from the necessity their legislators were under, from the different circumstances of the times and people, to enter into details of which their ruder ancestors had no conception: and this augmentation hath ever

† Spencer, Differt. de ratione Leg. Usuram prohibentis.

‖ Lindenbrogius, codex legum antiquarum.

ever been in proportion to the wealth and power of the people that was obliged to admit it; as might easily appear by fixing on any one period, and by comparing the laws of those nations where arts and trade were fully established, with those of others where they had not yet got so firm a footing.

WITHIN these last two hundred and fifty years, the inhabitants of Europe in general, particularly those that have any considerable share in universal commerce, seem to have been seized with an epidemical madness of making new laws; insomuch that there is scarce a state whose laws, since the year 1500, are not equal, if not superior, in number and bulk, to those made in many preceding ages: an effect owing, partly to the decay of the old military system, and to the necessity every government was under, to have recourse to new methods for its support, when that failed; but principally to the discoveries of America, and of the passage to the East Indies; which, by the peaceful arts of industry and trade, have poured into modern Europe an accession of treasure, equal to what was amassed in Italy by conquest and rapine under the Roman empire. As Britain, during this interval, shared more largely than any other country in this vast increase of wealth, it is not surprising that her later laws have been numerous and voluminous in proportion.

BUT there is another cause peculiar to these nations, which hath not a little contributed to the same end, namely, that happy constitution, and that liberty in which we so justly glory. A constitution which lodges the supreme, the legislative power in three different hands, each of which (if considered apart) hath an interest separate and distinct from the other two, must require a variety of wise regulations, so to ascertain their respective rights and privileges, and so to poise and balance them, as to put it out of the power of any one to overtop the others. A constitution that admits the people, by representation, to so considerable a share of power, must have many laws to determine the manner of elections, and the qualifications both of electors and elected. A constitution that makes the preservation of political freedom its great object, and that aims to defend the life, liberty, and property of the meanest individual, not only against others of their own rank, but even against the executive power of the society itself, must have many extraordinary fences, and barriers, to protect the weak from the mighty. Such a constitution must, more particularly than others, restrain its judges, the dispensers of justice, who are, at the appointment of the crown, to follow the

the strict letter of the positive laws ; lest, under the pretence of explaining and extending them, the most valuable privileges of the people might be betrayed, or rendered illusory. And this very restraint, so necessary in such a form of government, will eternally (as new cases arise, which, not being in the contemplation of the legislature at the time, were not comprehended in the words of the old provisions) occasion the framing of new ones.

THE state and condition of these kingdoms are such, therefore, as necessarily require a great number of laws ; and heavy as the burden of them may seem, it should be borne with cheerfulness, by all who esteem the conveniences of life, and the perfection of arts, more than a rude and simple state of nature ; who think wealth more eligible than poverty, and power than weakness ; or lastly, who prefer our excellent form of government, and its mild administration, to the despotic tyrannies of Asia, or the more moderately absolute monarchies of Europe.

FROM what hath been already observed, the difficulties attending this study in these kingdoms will readily appear ; but these, instead of discouraging, should animate every gentleman, and inspire him with resolution to surmount them ; when he considers them as inseparable from the happy situation in which we are placed, and that the character of an upright and skilful lawyer is one of the most glorious, because one of the most useful to mankind ; that he is a support and defence of the weak, the protector of the injured, the guardian of the lives and properties of his fellow citizens, the vindicator of public wrongs, the common servant both of prince and people, and, in these countries, the faithful guardian of those liberties in which we pride ourselves, and which the bounteous Creator bestowed originally on all the sons of Adam, and would have continued to them, had they continued worthy of the blessing.

FROM hence, likewise, abundantly appears the necessity of proper methods being pointed out for the study of the laws, and of proper assistance being given to the youth intended for this profession. This was always allowed, and for this purpose were the inns of court originally founded ; and it must be owned, that in ancient times, they, in a great measure, answered the end. Their exercises, in those days, were not mere matters of form, but real tests of the student's proficiency. Their readers laid down, in their lectures, the principles of particular parts of the law, explained the
difficulties,

difficulties, and reconciled the seeming contradictions, though, at the same time, it must be owned, too many of them exerted themselves in displaying their own skill and depth of knowledge in the profession, rather than in removing the obstructions, and smoothing the ruggedness which are so apt to discourage beginners, and which all beginners must meet in this untrodden path, without a guide. But, since the time that these aids have been there laid aside, and that, in the midst of so great and so rich a city, any degree of restraint or academical discipline, to keep the students constantly attentive to the business they are engaged in, hath been found impracticable, it has been the wish of every considering person, that the elements of this science should be taught in some more eligible place, where the students may at once have the benefit of a proper method of instruction, and by proper regulations be obliged to improve themselves in a study so important both to them and the public.

THAT the universities, the seats of all other branches of learning, are the places most fit for this purpose, hath been so fully proved by Mr Blackstone, in his preliminary lecture, not long since reprinted in this kingdom, that it will be much more proper and decent for me to refer gentlemen to that excellent performance, than to weaken his arguments, by repeating, in other words, what he has demonstrated, with such force of reason, and elegance of expression. I shall only add to what he hath observed, that every other nation of Europe hath admitted the profession of their municipal laws into their universities, and that the same hath been the opinion and practice of almost every age and country, as far back as the lights of history extend. Were not the laws of Egypt, as well as their religion, physick, history, and sciences, taught in the colleges of their priests? It is allowed by all, that the principal employment in the schools of the prophets was the study of the law of Moses; and, to come to more modern times, the very first universities that were ever founded by royal authority, were the works of Roman emperors, and erected merely for this profession. The famous academies of Rome for the west, and of Berytus for the east, furnished that extensive empire with a constant succession of excellent lawyers, whose names, and the fragments of whose works were held in the highest honour, until the inundation of barbarians from the north of Europe, and the prevailing arms of the Saracens in the east extinguished the Roman government in those parts. But that of Constantinople, founded soon after the translation of the seat of empire thither, had a more happy destiny,

destiny, flourished with distinguished reputation to these later ages, and perished not, but with the empire itself, when that city was taken by the Turks. Nay, so sensible were the Arabs themselves, who destroyed the Roman academy of Berytus, of the utility of such institutions, that, for their own law, they erected others of the same nature in Bagdad†.

ANOTHER powerful reason for laying the foundation of this branch of learning in these seats of literature, arises from the great utility, or rather, indeed, necessity, that all gentlemen bred in them are under, of gaining a general idea, at least, of the principles and practice of the law of their country. How advantageous this would be to every rank of gentlemen, whether legislators, magistrates, divines, or jurymen; and to all, in short, who have any property, to preserve, or transmit, or who have wishes or desires to acquire any, may be seen at large, illustrated by Mr Blackstone in the same performance. And indeed, if, before the attempt, there could be any doubts of the propriety of beginning this study in an university, the extraordinary success of his lectures in Oxford, and the high reputation he hath so justly acquired thereby, leave no room for entertaining such at present. For though much of both must be attributed to the singular abilities of that gentleman, yet it must be allowed that the most skilful gardener cannot make a tree flourish in a soil unnatural to its growth. With the deepest gratitude, therefore, should the members of this university acknowledge the munificence, and the wisdom of our present most gracious Sovereign, who established the present foundation for the benefit of the youth of this kingdom.

BUT if the importance of this institution to the public be considered, together with the difficulties attending the just execution of it, when these difficulties are enhanced by the novelty of the attempt, when the public attention is engaged by that very novelty, and when the future success of the foundation, may, perhaps, in some measure, depend on the opinion conceived of it at the beginning; he must, indeed, be possessed of a very overweening opinion of his own abilities, who can undertake so arduous a task, without feeling strong apprehensions at the first setting out. All the return the person thought worthy by this learned body to fill this chair can make them for so high an honour, and so important a trust, is to assure them,

† Conringius de Antiquitatibus Academicis. Bruckerus, Hist. Philos. Giannone's hist. of Naples, lib. I. chap. 10. § 1. and II. lib. II. chap. 6. § 1.

them, that the utmost care, and the greatest exertion of what knowledge and abilities he possesseth, shall be employed to answer the ends proposed, and to justify, as far as in him lies, the choice they have made. And if the young gentlemen for whose benefit these lectures are designed, possessed with a just notion of the great utility to themselves, and their country, of the study they are engaged in, will exert that industry, for the honour of their mother university, which hath made her so long famous for other branches of learning; he doubteth not but his weak endeavours at the first essay, will not only merit indulgence, but in the end be crowned with considerable success. On their assiduity, as well as upon his skill, must the success of the undertaking depend.

IN the next lecture the grounds and reasons of the plan proposed, as most proper for the commencing this study in this university, shall be laid open, in hopes that the students will proceed with the more alacrity, if they can be once convinced they are set in the right track, and that, by the professor's laying before the public the inducements he had to prefer this before any other, he may acquire information from the skilful of its errors and imperfections, and, consequently, alter it, so as most effectually to answer the useful ends of the institution.

B

LECTURE

LECTURE II.

The plan of the present undertaking—The particulars in which it differs from that adopted by Mr Blackstone—The different situations of the Universities of Oxford and Dublin—The chief obstructions which occur to the student of the English laws—The methods which may be employed to remove them—The law of things more proper to introduce a system of jurisprudence than the law of persons—The law of things, or of real property in England, has its source in the feudal customs—The necessity of a general acquaintance with the principles of the feudal polity—The method in which it is proposed to treat of it.

HAVING, in the preceding lecture, shewn the necessity of a proper method being pointed out for the study of the laws of these kingdoms, from the utility, as well as multiplicity of them; and having explained from whence that multiplicity arises, and that it is inseparable from the happy situation we are placed in; and having acknowledged the great advantage the students of Oxford have received from Mr. Blackstone's lectures, it will doubtless be thought necessary, that something should be said by way of illustration of the plan proposed to be followed here, and in justification of its departure from the excellent one which that gentleman has given us in his analysis. The method of instruction intended to be pursued in this place is not proposed as more perfect, or absolutely better in itself, but as one that appears more adapted to the circumstances of our students; and as it will be allowed, that his course of lectures, in the manner they proceed, hath some great advantages as to the finishing a lawyer, which cannot be attained, and therefore should not be attempted here, it will be particularly the duty of your professor to compensate for those, by guarding against some inconveniencies, which the extensiveness of his plan must of necessity subject young beginners to. I shall, therefore, proceed briefly to compare the situation of the two universities, in hopes, by that consideration, in some measure to vindicate the several particulars wherein I have chosen to vary from his scheme. The attendance on the courts of Westminster-Hall, when once a gentleman hath read and digested enough to listen with understanding to what he there hears, hath, for a succession of
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ages, been allowed to be, and it must be owned is, the most effectual means of accomplishing a lawyer, and fitting him for practice. In this respect Oxford, in her proximity to Westminster, hath certainly an advantage, as to her law students of above two years standing, who may at that time be supposed capable of improvement by the arguments in the 'courts of law ; as she is thereby rendered capable of conjoining those two excellent methods of instruction. Mr. Blackstone was fully sensible of this happy circumstance, and, accordingly, his scheme is adapted to it. All the lectures there are appointed at times that fall in the law vacations, and the course is general and diffusive, not calculated merely for attendants of the first and second years, but adapted also to those of a more advanced standing, and consequently, in a manner equally copious, or very nearly so, illustrates every one of the several branches of the English law. But this method, however excellent in itself, and most eligible where gentlemen can have an opportunity of attending the professor for several successive years, must, on the other hand, be allowed to labour under some inconveniencies, especially as to those who are yet novices, which, as it should be the particular care of the professor here to obviate, it cannot be improper briefly to point out.

As the lectures of the English professor are all read in the law vacations, and in all of them, except the long one, when few young gentlemen of fortune stay in the universities, the shortness of these vacations necessarily occasions these lectures to follow each other in a very quick succession ; and, accordingly, we find that five are delivered in every week. It is impossible, therefore, that the students at first should keep any manner of pace with their professor in their private reading, without which the ablest performances in the way of prelections will be of little utility. Many things in the succeeding ones must be rendered very difficult, if not absolutely unintelligible, for want of a due time for mastering and digesting those that preceded ; and another unhappy consequence of this quick succession is, that the most useful and effectual method of instruction to beginners, at their entrance upon any science, namely, a continued examination of the progress they have made, is hereby entirely precluded, and rendered impracticable. The great advantage of that method need not be enlarged upon in this place, as every gentleman who hears me must be already fully satisfied of it from his own experience.

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BUT this university is circumstanced in a very different manner. The necessity our students are under of repairing to Westminster, to finish their studies, before they are called to the bar, and their incapacity to reap any benefit from the courts of law while they reside here, render it impossible, as well as unnecessary, to conjoin those two methods of instruction before-mentioned, as is done at Oxford; and, by confining the professor to pupils of two years standing or little more, make it highly improper for him to enter minutely into those parts of the law his audience have not yet had time to apply to. His great object, therefore, should be so to frame his lectures, as to be most useful to youth at the beginning, to be particular and copious in the elementary parts, in order to lay a sure foundation, and to smooth and make plain the difficulties which at first will every where occur. And as, for these reasons, a general and equally diffusive course is a method improper for him to pursue, it should be his especial care to avoid, or remedy the inconveniencies with which such an one is necessarily attended.

IT is a well known truth, that the entrance on any study, however easy and agreeable such study might be after some progress made in it, is at the beginning very irksome, and attended with many perplexities; principally arising from the use of new terms, whose significations are yet unknown. But the laws of all nations, and those of England above all others, abound in such novel words, and old ones used in an uncommon sense, more than any other science, and therefore must be attended with difficulties in proportion. And although many of its terms occur frequently in common conversation, and may, consequently, be supposed already understood, this is rather a disadvantage than otherwise; for in common discourse they are used in so vague and undetermined a meaning, and so far from strict precision and propriety, that it is no wonder so many persons exclaim at the absurdity of its maxims; which, though frequently in their mouths, they do not really understand. Young gentlemen, then, have not only many new words to acquire the signification of, but they must likewise unlearn the import of many others they are already acquainted with, and affix to those familiar terms new and precise ideas, a task, as Mr. Locke observes, of no small difficulty, and that requires not only the strictest attention, but constant care and frequent repetition. Another great difficulty the study of the law of England labours under, peculiar to itself,
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is that want of method, so obvious to be observed, and so often complained of in its writers of authority, inasmuch, that almost all of them, and lord Coke particularly, are too apt to puzzle and bewilder young beginners; whereas other laws, the civil, the canon, the feudal, have books of approved authority, (and none other but such should be put into the students hands,) calculated purposely for the instruction of novices; wherein the general outlines of the whole law are laid down, the several parts of it properly distributed, its terms explained, and the most common of its rules and maxims, with the reasons of them, delivered and inculcated. It is not to be admired then that Sir Henry Spelman so pathetically describes his distress at his first entrance upon this study. *Emisit me mater Londinum, juris nostri capeffendi gratia, cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbaram, methodum inconcinnam, molem non ingentem solum, sed perpetuis humeris sustinendam, excidit mihi fateor animus* †.

THESE then are the obstructions to be removed, and the difficulties to be obviated, by a professor who considers it his business to lead by the hand young gentlemen, yet strangers to the study; and for this purpose he should exert his utmost care and attention, not to overburthen the memories, or to distract the attention of his audience with too great variety at first, but to feed them with knowledge as he finds them capable, and to give them time, by reading and meditation, to become masters of what they have already acquired, and by frequent examinations to satisfy himself they thoroughly comprehend and retain the substance of his past lectures. The utility of this last method, by which the students will be laid under a necessity of reading in private, as to them, will be readily allowed; but taken in another view will be of no less assistance to the professor himself, in framing the prelections he is to read. He will not only be encouraged to proceed with more alacrity, when he daily observes the success of his endeavours, but also, by the trial, be convinced of any defects or errors in his plan that before escaped his observation, and will be warned thereby to amend them; and he will by this means be particularly and perpetually cautioned against the great and too common mistake of tutors, namely, their imagining that such explications as are easy and familiar to them, will be equally obvious to unexperienced youth. But an examination will demonstrably shew him where his illustrations have been defective or obscure, and

† Præfat. ad Glossar.

and will oblige him to accommodate his lectures to the capacity and progress of his hearers. The next variation in the present plan from that of Mr Blackstone, to be taken notice of, is the proposal of beginning with the law of *things*, not with the law of *persons*, as he hath done. It must be allowed impossible thoroughly to understand the law of things, without some previous knowledge of that of persons; but it is equally impossible to be master of the law of persons, without an acquaintance with that of things. Since, therefore, we must begin with one of them, perhaps it will be sufficient to observe, that such knowledge of the names and relations of persons, as is generally acquired by observation, before a person arrives at an age fit for engaging in this study, will enable him tolerably to understand the law of things; and that whatever more is necessary, and hath not been attained by this means, may be easily supplied as the student goes on. And, that I may not be thought to lean too much on my own opinion in this particular, I shall quote the famous Sir Matthew Hale to the same purpose; who, in his Analysis, introduces the law of things in the following manner: “ Having
 “ done with the rights of persons, I now come to the rights of things; and,
 “ though, according to the usual method of civilians, and of our ancient
 “ common law tractates, this comes in the second place, and after the *jura*
 “ *personarum*, and therefore I have herein pursued the same course; yet that
 “ must not be the method of a young student of the common law, but he
 “ must begin his study here, at the *jura rerum*; for the former part contains
 “ matter proper for the study of one that is well acquainted with those *jura*
 “ *rerum*†.” And, agreeably hereto, the wisdom of ages hath declared *Littleton’s Tenures*, which contains the common law of England, as far as it concerns real property, that is, lands or interests derived out of and flowing from them, to be the book most proper for students to begin with, in their study of the law of these nations.

TAKING it then for granted at present, that the law of real property is the fittest introduction, it will be necessary, as it is confessed to be the most important, the most extensive, and, in consequence, the most difficult part, to lay the foundation deep and sure, and to derive its rules from what is now universally allowed to be its source, the feudal customs. This, indeed, hath been denied by Lord Coke, and others of his age; who thought it would depreciate the excellence of the laws of their country, to admit they were derived from any other nation. But if those gentlemen had read over
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but once the two books of the feudal law with tolerable attention, they must have received conviction, that one of the laws was certainly derived from the other; and which of them was so would easily appear, by comparing the law of England after the conquest, with that which prevailed in the Saxon times, and was not strictly feudal, exclusive of the testimony of the old historians.

BUT, perhaps, for this purpose, it may be thought sufficient to explain and deduce these rules from the feudal ones, as they occur occasionally in the books of the common law; which is the method, that, in conformity to the rest of his plan, the Oxford professor has adopted, and that the reading through a course of that law, even the shortest, will be attended with an unprofitable delay, and detain the students too long from their principal object. The answer to this objection is short, and, if well founded, perfectly satisfactory. It is, that the real reason of proposing a system of the feudal law to be gone through, was to save time. The method is so much better, and clearer, and, by necessary consequence, so much easier to be comprehended, and retained, that the delay will be abundantly compensated, and one third at least of Littleton will be understood, and known by the students, before they open his book. For the maxims of the common law, as they lie dispersed in our books, often without reasons, and often with false or frivolous ones, appear disjointed and unconnected, and as so many separate and independent axioms; and in this light very many of them must appear unaccountable, at least, if not absurd; whereas, in truth, they are almost every one of them deducible, by a train of necessary consequences, from a few plain and simple rules, that were absolutely necessary to the being and preservation of such kind of constitutions as the feudal kingdoms were. The knowledge of which few, timely obtained, will obviate the necessity of frequent and laboured illustrations, as often as these maxims occur in our law, will reconcile many seeming contradictions, and will shew that many distinctions, which at first view appear to be without a difference, are founded in just and evident reason: to say nothing of the improvement the mind will attain by exercise, in following such a train of deductions, and the great help to the memory, by acquiring a perfect knowledge of the true grounds of those various rules, and of their mutual connection with and dependence on each other. *Ignoratis causis rerum, ut res ipsas ignoretis, necesse est*, is a maxim frequently in our lawyers mouths; and

and Littleton and Coke continually exhort the student to explore the grounds and reasons of the law, as the only safe foundations to build on, and deny that any man, without being perfectly acquainted with them, can merit the honourable appellation of a lawyer.

BUT there is another, and, for gentlemen of rank and fortune particularly, a more important consideration, that renders a general acquaintance with the principles of the feudal law very proper at all times, but at present eminently so; namely, the necessity of knowing these, for the understanding the nature of those Gothic forms of government, which, until these last three hundred years, prevailed universally through Europe, and whence the present constitution, with several corrections and improvements indeed, in which these islands are now so happy, is undoubtedly derived. From hence only shall we be able to determine whether the monarchy of England, as is pretended, was originally and rightfully an absolute royalty, controuled and checked by the virtue of the prince alone, and whether the privileges of the subjects, which we are so proud of, were usurpations on the royal authority, the fruits of prosperous rebellion, or at best the concessions of gracious princes to a dutiful people, and revocable by them or their successors, whenever, in their opinion, their vassals should become undeserving; principles that were industriously, and, to the misfortune of a deluded royal family, too successfully propagated during the last century, and that, of late, have been revived and defended, with no less zeal, than seeming plausibility. Every man, indeed, of candour and humanity, will look with tenderness on the errors of princes, unhappily educated in mistaken notions, and make due allowances for the weight which arguments urged with great apparent force of reason, concurring with the lust of power, so natural to the human breast, will certainly have on such minds; but, surely, this indulgence may be carried too far, and will be allowed so to be, if, for their justification, it shall appear, upon examination, that the history of past ages has been partially delivered down, and perverted; and that to the vain and unprofitable grandeur of the prince, the happiness of millions, and their posterity, hath been attempted to be offered up in sacrifice. The question is of a matter of fact; for on the decision of the fact, how the constitution of England antiently stood, the question of the right solely depends. And surely it is the duty of every gentleman to inform himself, on the best grounds, whether those great men, who, for a suc-
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sion of ages, exposed their lives in the field, or exerted their eloquence and wisdom in the senate, for the purpose of preserving, and perpetuating these privileges, deserved the honourable name of patriots, or the detestable appellation of rebels ; whether the grievances our glorious deliverer came to redress were real or imaginary ; or, if real, were such as our fathers were in conscience bound to submit to ; and whether we can with justice give to the family that now fills our throne with such lustre and dignity, that title which they have always esteemed as their highest honour, of being the lords of freemen, and the assertors of the liberties of mankind.

As the book * which it is intended the young gentlemen shall read for the purpose of acquiring a general idea of the feudal law, is composed in a systematical method, it is proposed that these lectures shall proceed in an historical one, in order to shew the original reasons of those customs, and to point out from what small beginnings, and by what particular steps and gradations the mighty fabrick rose. By this means the additions to, and the alterations of the law will be seen in a clearer light, when we are acquainted with the nature of the regulations already in being ; and by knowing the circumstances of the times, can at once perceive the wisdom and necessity of such additions and alterations. And it is hard to imagine a study more improving, more agreeable, or better adapted to a liberal mind, than to learn how, from a mere military system, formed and created by the necessities of a barbarous people, for the preservation of their conquests, a more extensive and generous model of government, better adapted to the natural liberties of mankind, took place ; how, by degrees, as the danger from the vanquished subsided, the feudal policy opened her arms, and gradually received the most eminent of the conquered nation to make one people with their conquerors ; how arts and commerce, at first contemptible to a fierce and savage people, in time gained credit to their professors, and an admittance for them into the privileges of the society ; and how, at length, with respect to the lowest class of people, which still continued in servitude, its rigour insensibly abated ; until, in the end, the chains of vassalage fell off of themselves, and left the meanest individual, in point of security, on an equal footing with the greatest.

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* Corvini jus feudale.

THUS much has been thought necessary to observe, in order to shew the reasons of proposing a course of the feudal laws, as an introduction to the English; to which may be added, that this method hath received the approbation of many good judges, and hath, in experience, been found not only useful for the end proposed, as it is the constant practice in Scotland, whose laws, except in the manner of administering justice, differ little from ours, and hath been also used in England with good success; but, at the same time entertaining, and improving in other respects.

As we are to begin, therefore, with this law, the observations on the remaining parts of the plan may be, for the present, deferred; I shall, in my next lecture, begin to deduce the origin of this law, and of its rules, from the customs of the German nations, before they invaded the Roman empire.

LECTURE

LECTURE III.

An enumeration and confutation of several opinions concerning the foundation of the feudal customs—The origin and rules of the feudal law to be deduced from the institution of the German nations before they invaded the Roman empire—The English indebted for this law to the Franks—A general description of this people, with an account of the several orders of men into which they were divided while they continued in Germany.

THE feudal customs succeeded the Roman imperial law in almost every country in Europe, and became a kind of a *jus gentium*; but having sprung up in rude illiterate ages, and grown by slow degrees to a state of maturity, it is no wonder that very different have been the opinions concerning their origin, and that many nations have contended for the honour of giving them birth, and of having communicated them to others. Several eminent civilians, smit with the beauty of the Roman law, and filled with magnificent ideas of the greatness of that empire, have imagined that nothing noble, beautiful, or wise, in the science of legislation, could flow from any other source; and, accordingly, have fixed on Rome as the parent of the feudal constitutions. But as the paths of error are many, and disagreeing, so have their endeavours to make out, and defend this opinion, been various in proportion; a short mention of them, and a very few observations, will be sufficient to convince us, that they have been all mistaken.

FIRST, then, some civil lawyers have discovered a likeness between the Roman patrons and clients, an institution as early as Romulus himself, and the feudal lords and vassals†. The clients, we are told, paid the highest deference and respect to their patrons, assisted them with their votes and interest; and, if reduced to indigence, supplied their necessities by contributions among themselves, and portioned off their daughters. On the other hand, the patrons were standing advocates for their clients, and obliged to defend, in the courts of law, their lives and fortunes. The like respect was paid by vassals to their lords, and similar assistance was given

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† See Craig, de Feud. lib. 1. dieg. 5. and Selden's Titles of Honour, part second, chap. 1. § 23. Bafnage, Coutume reformée de Normandie, tom. 1. p. 139.

to their wants. The fortune of the first daughter, at least, was always paid by them, and if they were impleaded, they called in their lords to warrant and defend their lands and other property. Thus far, we must confess, there is a strong resemblance; but the differences are no less material, and shew plainly that the one could not proceed from the other. The connection between the patron and the client was merely civil; whereas the relation between the lord and the proper vassal was entirely military; and his fealty to his superior was confirmed by the sanction of an oath, whereas there was no such tie between patron and client. The aids which the tenant gave to his lord's necessities, except in three instances, established by custom, to redeem his lord's body taken in war, to make his eldest son a knight, and for the first marriage of his eldest daughter, were purely voluntary. But the great point which distinguishes them was, that whereas the Roman client's estate was his absolute property, and in his own disposal, the feudal vassal had but a qualified interest. He could not bequeath, he could not alien, without his lord's consent. The *dominium verum* remained with the lord to whom the land originally had belonged, and from whom it moved to the tenant. Upon the failure therefore of the tenant's life, if it was not granted transmissible to heirs, or if it was, on the failure of heirs to the lands, it reverted to the original proprietor. Neither was the lord, on all occasions, and in every cause, bound to be his vassal's advocate, or, as they express it, *bound to warranty*, and obliged to come in and defend his tenant's right and property. For the fealty on one side, and the protection on the other, extended no farther than the feudal contract; and therefore the one was not bound to warrant any of the tenant's lands, but such as were holden of him, nor the other to give aid, or do service in regard of his whole property, but in proportion to that only which he derived from his superior. Add to this, that the lord, in consideration of the lands having been originally his, retained a jurisdiction over all his tenants dwelling thereon, and in his court sat in judgment, and determined their controversies. These striking diversities (and many more there are) it is apprehended, will be sufficient to demonstrate the impossibility of deriving the feudal customs from the *old* institution of patron and client among the Romans.

SECONDLY, Others, sensible that military service was the first spring, and the grand consideration of all feudal donations, have surmised, that the grants

grants of forfeited lands by the dictators Sylla and Cæsar, and afterwards by the triumvirs Octavius, Anthony and Lepidus, to their veterans, gave the first rise to them†. In answer to this, I observe, that those lands, when once given, were of the nature of all other Roman estates, and as different from fiefs, as the estates of clients, which we have already spoken of, were. Besides, these were given as a reward for past services, to soldiers worn out with toil, and unfit for farther warfare; whereas fiefs were given at first gratuitously, and to vigorous warriors, to enable them to do future military service.

OTHERS have looked upon the emperor Alexander Severus‡ as the first introducer of these tenures, because he had distributed lands on the borders of the empire, which he had recovered from the Barbarians, among his soldiers, on the condition of their defending them from the incursions of the enemy; and had granted, likewise, that they might pass to their children, provided they continued the same defence. This opinion, indeed, is more plausible than any of the rest that derive their origin from the Romans, as these lands were given in consideration of future military service; yet, when we consider, on the one hand, that in no other instance did these estates agree with fiefs, but had all the marks of Roman property; and that, on the other hand, feudal grants were not, for many ages, descendible to heirs, but ended, at farthest, with the life of the grantee, we shall be obliged to allow this notion to be as untenable as any of the foregoing.

THE surmise of some others, that the feudal tenancies were derived from the Roman agents, bailiffs, usufructuaries, or farmers, is scarce worth confuting; as these resembled only, and that very little, the lowest and most improper feuds; and them not in their original state, when they were precarious, but when, in imitation of the proper military fief, which certainly was the original, they were become more permanent.

LASTLY,

† Selden. *Ibid.* Craig, lib. 1. *dieg.* 5.

‡ This Emperor, says Lampridius, gave the territories gained on the frontiers, *limitaneis ducibus et militibus*, ita ut eorum essent si hæredes illorum militarent, nec unquam ad privatos pertinerent; *dicens attentius eos militaturos si etiam sua rura defenderent.* Addidit sane his et animalia et servos; ut possent colere quod acceperunt, ne per inopiam hominum vel per senectutem possidentium defererentur rura vicina barbariæ, quod turpissimum esse dicebat. See also Molin. in *consuet. Paris.* tit. 1. de Fiefs, and Loyseau, des Off. lib. 1. chap. 1.

LASTLY, Some resort as far as Constantinople for the rise of fiefs, and tell us that Constantine Porphyrogenetus was their founder; but he lived in the tenth century, at a time that this law was already in France, Germany, Italy, and Spain, where it had arrived very near its full perfection, and was therefore undoubtedly his model: So that, tho' we must acknowledge him the first who introduced these tenures into the Roman empire, to find their original, we must look back into earlier ages, and among another people.

THE pretensions of the Romans having been considered, and set aside, it follows, that this law must have taken its rise among the barbarous nations; but from which of them particularly, remains to be inquired. Some, solicitous for the honour of the antient Gauls, quote Cæsar's account of their manners; *eos qui opibus valebant multos habuisse devotos, quos secum ducerent in bella, soldurios sua lingua nuncupatos; quorum hæc est conditio, ut omnibus in vita commodis una cum his fruantur quorum se amicitie dediderint; si quid iis per vim accidat, aut eundem casum una ferant aut sibi mortem consciscant*†; in these words they imagine they have plainly the mutual connection between lords and vassals. The Spaniards too put in their claim for the antient Celtiberians, of whom Plutarch, in his life of Sertorius and Valerius Maximus, gives the same account that Cæsar doth of the antient Gauls; and Sir Edward Coke, in his zeal for the common law of England, which, although he did not know it, is certainly feudal, relying on fabulous historians, carries its antiquity so far back as to the British kings of Geoffrey of Monmouth. But one short and plain observation will fully dissipate such vain conceits, namely, that, whatever were the original customs of the barbarous nations, inhabiting Gaul, Spain, or Britain, they were, many ages before the rise of this law, entirely annihilated and forgotten. Gaul, Spain, and Britain, were, for centuries, Roman provinces, governed entirely by Roman magistrates, according to the imperial laws. For the Romans were particularly studious of introducing their dress, their language, their laws and customs, among the conquered nations, as the surest, and most effectual means of keeping them in subjection.

HENCE, it appears, we must find the true original of this law among those nations, that destroyed the Western Empire of the Romans; where we first perceive

† De bell. Gall. lib. 4. chap. 22.

perceive the traces of it, that is, among the Franks, Burgundians, Goths, and Lombards*. Of these the first and last have the greatest number of advocates; and, whether out of jealousy to the French monarchy, or not, I cannot determine, the majority declares for the Lombards. These different opinions, however, may be easily adjusted, by distinguishing between the *beneficiary law*, as I shall call it, while the grants were at will, or for years, or at the utmost for life, and that which is more properly and strictly called *feudal*, when they became transmissible to heirs, and were settled as inheritances. As to the beneficiary law, no one of these nations can lay a better claim to it than another, or with reason pretend that the rest formed their plan upon its model; each of them independent of the other, having established the same rules, or rules nearly the same; which were, in truth, no more than the ancient customs of each nation, while they lived beyond the Rhine, and were such as were common to all the different people of Germany. But, as to the law and practice of feuds, when they became inheritances, there can be little doubt but it was owing to the Franks. For the books of the feudal law, written in Lombardy, acknowledge, that the Emperor Conrad, who lived about the year 1024, was the first that allowed fiefs to be descendible in Germany and Italy†; whereas the kingdom of the Lombards was destroyed by Charlemagne above two hundred years before; and he it was who first established among his own Franks the succession of fiefs, limiting it, indeed, only to one descent. His successors continued the same practice, and, by slow degrees, this right of succession was extended so, that by the time of Conrad, all the fiefs in France, great and small, went in course of descent, by the concession of Hugh Capet, who made use of that device, in order to sweeten his usurpation, and render it less disagreeable‡. By this concession he, indeed, established his family on the throne, but so much weakened the power of that crown, that it cost much trouble, and the labour of several centuries, to regain the ground then lost.

THE opinion of the feudal law's being derived from the Lombards seems owing to this, that, in their country, those customs were first reduced into writing,

* Montesquieu, *L'esprit des loix*, liv. 30. chap. 2. and 6.

† *Lib. Feud. 1. tit. 1.*

‡ *L'esprit des loix*, liv. 31. chap. 31.

writing, and compiled in two books, about the year 1150, and have been received as authority in France, Germany and Spain, and constantly quoted as such. But then it should be considered, that the written law in these books is, in each of those nations, especially in France, controuled by their unwritten customs; which shews plainly, that they are received only as evidence of their own old legal practices. For had they been taken in as a new law, they would have been entirely received, and adopted in the whole.

BUT if, in this point, I should be mistaken, and the Lombards were really the first framers of the feudal law; yet I believe it will be allowed more proper for the person who fills this chair to deduce the progress of it through the Franks, from whom we certainly borrowed it, than to distract the attention of his audience, by displaying the several minute variations of this law, that happened as it was used in different nations. To the nation of the Franks, therefore, I shall principally confine myself, and endeavour to shew by what steps this system of customs was formed among them, and how their constitution, the model of our own just after the conquest, arose; and at the same time I shall be particularly attentive to those parts of it only that prevailed in England, or may some way contribute to illustrate our domestic institutions.

IN order, then, to illustrate the original of the French constitution, and of their beneficiary, and its successor the feudal law, it will be necessary to enter into some details as to the manners of this people, while they continued in Germany, and which they preserved for a considerable time after they passed the Rhine; as also to mention some few particulars of their history when settled in France, in order to shew the reasons of their original customs, and the ends their policy aimed at, and how, by change of circumstances, the preservation of that system required new regulations; how the feudal law arose, and grew to that perfection, in which, for so many ages, it flourished throughout Europe. As skilful naturalists discover in the seed the rudiments of a future tree, so, in a few passages of Cæsar and Tacitus, concerning the customs of the Germans, may be seen the old feudal law, and all its original parts, in *embryo*; which, in process of time, by gradually dilating and unfolding themselves, grew into a perfect and compleat body.

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It will be highly proper, therefore, for the clearer comprehension of what is to follow, to dwell somewhat particularly upon, and to make ourselves acquainted with, the manners and institutions of those people; and for this purpose, perhaps, it will be sufficient to consider them under the several following heads, viz. their general disposition and manners, the several ranks and orders of persons among them, their form of government, and the nature of their policy; their regulations touching property, their methods of administering justice, and the nature of the punishments they inflicted on criminals.

FIRST, as to their manners and general disposition: Germany was at that time a wild uncultivated country, divided into a great number of small cantons, separated from each other by thick forests, or impassable morasses, and inhabited by a rude and simple people, who lived either by the chase or pasturage, and were always either in a state of open war, or a suspicious peace with their neighbours: A circumstance that obliged every one of these little states to esteem military virtue in the first place, and to train up all their people, fit for that purpose, in the constant use of arms, and to keep them perpetually in a state ready always for either offence, or defence†.

BUT since, in every number of men, however assembled, some there will be, from the natural strength of their bodies, and courage of their minds, more fit for soldiers, and others, from the contrary causes, better adapted to the arts of peace; these nations were necessarily distributed into two ranks; those in whom the strength of the society consisted, the freemen or soldiers, who were, properly speaking, the only members of the community, and whose sole employment was war, or (in the intervals of hostilities, what Xenophon considers as its image) hunting; and an inferior order of people, who were servants to them, and, in return for protection, supplied the warriors with the necessaries of life, occupied the lands for them, and paid stipulated rates of cattle, clothes, and sometimes corn, namely, where they had learned the use of agriculture from the neighbouring Romans. I follow Craig in calling them servants rather than slaves, as an expression much more suitable to their condition; for they were not condemned to laborious works, in the houses of the freemen, as the slaves of other nations were.

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† Tacitus de moribus Germanorum. Cæsar de bell. Gall. lib. 6.

Among these simple people, the wives and children even of the greatest among them, and the old men, unfit for the toils of war, were their only domestics. The servants of the Germans lived apart, in houses of their own, and when they had rendered to their lords the services due by agreement, they were secured in the rest, as their own property; so that a servant among these people, though meanly considered by the superior rank, was, in truth, more a freeman than the generality of the Romans under their Emperors †. It has been an antient observation, that servitude among the northern nations hath always been more gentle and mild than among those that lay more southerly: A difference, to be ascribed to the different manners of the people, resulting partly from their climate, and partly from their way of life. A plain and simple people, unacquainted with delicacies, were contented with the plainest fair; which was easily supplied, without afflicting their servants with heavy labour, and gave no room for envy and discontent in the breasts of inferiors. And a nation that had always the sword in their hands were too conscious of their own strength, to entertain any apprehensions from those, who, from their unsuitness for that profession, were destined to other employments. All motives, therefore, to fear on the one side, and to envy and discontent on the other, being removed, we need not be surprized at the general humanity with which the servants were treated in these northern regions. The putting them in chains was a thing exceedingly rare, and the killing them, except in a sudden gust of passion (an accident which frequently happened among the freemen themselves) was almost unheard of. The only difference in that case was, that the death of a servant was not looked upon as a public crime, he being no member of the political society, and therefore was not punished. Such then was the mutual affection and confidence of these two ranks in each other, that whenever there was occasion, they made no scruple of arming such of their servants as were capable, and, by making them soldiers, admitted them into the number of freemen; and the hopes of such advancement, we may be assured, was a strong inducement to those of the lower rank to behave in their station with fidelity and integrity. Another cause of this great lenity to their servants arose from a custom peculiar to the Germans, which ordained

† Servis, non in nostrum morem descriptis per familiam ministeriis utantur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit; et servus hactenus paret. Tacit. de mor. Germ. cap. 25.

lained, that insolvent debtors should be reduced to servitude, until, either by his labour, the creditor was satisfied, or, as it frequently happened, the debt was paid by the insolvent's relations. It was, indeed, reputed dishonourable for the creditor himself to retain his debtor in servitude; but then he either sold him to the prince, or some other person.

AMONG so plain a people, perhaps it may be thought debts were rare, and that few instances occurred of freemen's being reduced to slavery; but Tacitus assures us of the contrary†. These people were possessed with the rage of gaming to such a degree, that nothing was more common than to see them, when all their property was lost, set their liberty itself at stake. It was natural, therefore, to treat those with gentleness, who had been once perhaps the most valuable members of the body politic, especially for them who knew their own privileges depended on the uncertain caprices of the same goddess Fortune, and that an unlucky throw might reduce them tomorrow to the same low condition. I have been the more particular on this head, in order to shew, that, even in their infancy, the feudal maxims were more favourable to the natural liberty of mankind, than the laws and customs of the southern and more polite nations, and were of such a spirit, as when circumstances changed, would naturally expand, and extend that blessing to the whole body of the people; as we find it at present in our excellent constitution.

To return, therefore, to the freemen: We find no traces of any different orders of men among them; but as no kind of government, however rude, can subsist without some subordination, and as it was impossible for them all to continue together in one body, it was found necessary, in order to disperse them round the country, that they should be subdivided into lesser parties, and to appoint to each a chief, the most eminent and capable among them; who, when a district was assigned him, distributed that among his followers; who again, after having retained what they esteemed sufficient for their own purposes, assigned part of what they had so received to their servants. And here, indeed, we see the first rude original of lords and vassals. These lords were those, of whom Tacitus says, *De minoribus rebus principes consultant*‡. One of these lords, and to him a larger territory was assigned

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† De mor. Germ. cap. 24.

‡ De mor. Germ. cap. 11.

than to the others, was the head of the whole body politic, and honoured with the title of king. He was the superior, who, at their general assemblies, made the distribution already mentioned, and appointed the other lords. And, besides his excelling the others in the enjoyment of a more extensive district, and in having a greater number of vassals and servants, he was remarkably distinguished from them in two particulars. His office was for life, and, in some degree, hereditary; for, in every nation there was one family, descended, it is to be presumed, from the first founder of the state, or some ancient hero, which was the only family noble by birth among them, and the members of which alone were capable of this high station. Not that these kings succeeded in a lineal, or any other regular course of descent; for Tacitus intimates sufficiently that they were elective, when he says, *Reges ex nobilitate sumunt*†. And indeed any one who considers attentively the circumstances of these people, always either ready to invade their neighbours, or dreading invasions from them, will allow, that any kind of a constant regular succession was inconsistent with their preservation. They were necessitated to choose among the royal family a man in the flower of youth, or, at least, in the vigour of life, who, by his valour and wisdom, might prove the proper head of a nation always in a state of war. This will appear beyond a doubt, if we examine the ancient practice of all the kingdoms founded by the Germans. Look over the lists of their kings in any one nation, and examine the degree of kindred in which they stood related to each other, and you will find them all, indeed, of one family; but you will, at the same time, see that scarce a third of them could derive their kindred, by way of title or descent, from their immediate predecessor; yet were they obeyed cheerfully by their subjects, nor ever looked upon in those days as usurpers, though several modern writers, possessed with opinions of their own ages, since kingdoms are almost universally settled in a regular course of descent, have been so liberal in bestowing that title upon them.

MONTESQUIEU allows this was the manner of succession in the second race of the Franks, but insists that those of the first inherited lineally‡. But was this so originally, when Clovis came to the crown, he who first united all the Franks under one sovereign? We find six or seven independent kings
of

† Ibid. cap. 7.

‡ L'esprit des loix, liv. 31.

of the Salian Franks, every one of them Clovis's near relations, and consequently descended from a common ancestor, at no very great distance. He thought not himself, nor his posterity, secure in the possession of the throne, until he had totally extirpated every other branch, and reduced the royal family to his single person. Then, indeed, there was no danger of a competition upon his death. So far was the crown from descending to any determined person, that the kingdom was divided among all his children; and, for several descents, his bloody example was followed in one generation, and in the next a new division took place; nor, in all this time, do we hear of any other title set up, than what followed either from the will of the father, the consent of the people, or the fortune of war; which, it is apprehended, is sufficient to shew, that, in these early ages, there were no invariable rules of succession settled among the Franks. Otherwise, how came the kingdom to be divisible, and the right heir to be obliged to content himself with a small portion of his supposed legal inheritance †?

IN the next lecture I shall give an account of the companions of the prince among the Germans, and finish what I have to observe of the constitution of their governments, and of their laws and customs, unto the time of their entering into the Roman empire.

† Mably, *Observations sur l'histoire de France*, liv. 1. cap. 3.

LECTURE

LECTURE IV.

The companions of a German prince—The constitution of a German kingdom—The condition of property in Germany—The methods followed there of distributing justice, and the nature of the punishments inflicted on criminals.

BEFORE we can be fully acquainted with all the several constituent parts of the German state, it will be necessary to form a just notion of those who were called the companions of the king or prince; who, being chosen out of the most robust and daring of the youth, and having attached themselves particularly to the person of their sovereign, were his chief defence in war, and the great support of his dignity in times of tranquillity. A few words of Tacitus will set this institution of theirs in a clear light. Speaking of their princes, he says, “ This is their principal state, their chief strength, to be at all times surrounded with a numerous band of chosen young men, for ornament and glory in peace, for security and defence in war; nor is it among his own people only, but also from the neighbouring communities, that a prince reaps high honour, and great renown, when he surpasses in the number and magnanimity of his followers; for such are courted by embassies, and distinguished with presents, and by the terror of their fame alone often dissipate wars. In the day of battle, it is scandalous for the prince to be surpassed in feats of bravery, scandalous to the followers to fail in matching the valour of the prince. But it is infamy during life, and an indelible reproach to return alive from a battle wherein their prince was slain. To preserve him, to defend him, and to ascribe to his glory all their gallant actions, is the sum, and most sacred part of their oath. For from the liberality of their prince they demand and enjoy that war-horse of theirs, and that terrible javelin, dyed in the blood of their enemies. In place of pay, they are supplied with a daily table and repasts, though grossly prepared, yet very profuse. For maintaining such liberality and munificence, a fund is furnished by continual wars and plunder †.”

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† De mor. Germ. cap. 13. and 14.

HERE, then, are to be seen most plainly the rudiments of that feudal connection, that afterwards subsisted between the king and all his military vassals, and of the oath of fealty which the latter took to him. To his person, and to aid him in all he undertook, his companions were bound, during his and their lives, by the strictest ties; but as to other freemen, who lived apart in their villages, the bonds of allegiance were much more loose. This rude people had no notion of what almost every civilized nation hath laid down as a maxim, that being born in, and protected by a society, creates a durable obligation. They served, indeed, in consideration of the lands they held, in all defensive wars; and in all offensive ones, which either were generally approved of, or in which they chose particularly to engage themselves. Nay, so great was the notion of particular independence among these people, that they thought that all of the freemen or soldiers, except the *comites*, who had by oath bound themselves to the person of the king for life, were at liberty to engage in expeditions, that neither the king, nor the majority of the nation consented to; and that under leaders of their own choosing. For as, at their general meetings, war was necessarily the most common subject of deliberation, if any one proposed an enterprize, all who approved the motion were at liberty to undertake it; and if the king declined commanding therein, they chose a general capable thereof; and when, under his conduct, they had succeeded, they either returned, and divided the spoil, and became subjects of their former king as before; or, if they liked the country they had subdued better, settled there, and formed a new kingdom, under their victorious leader. *Duces ex virtute sumunt*, saith Tacitus; a practice hard to be accounted for among nations exposed to continual danger, and which must be thereby frequently weakened; on any other supposition, than that it was first introduced to disburthen a narrow territory, overstocked with inhabitants. This effect, however, it must have had, that their kings were rendered more martial, and obliged equally by their glory and interest, to command in every expedition, that was agreeable to any considerable number of their subjects.

FROM this custom Montesquieu very ingeniously conjectures, that the Franks derived their right of conferring on their *mairs de palais* the power of war, at a time, when, by the long continued slaughters of the royal family, they were obliged to place the crown on the heads of minors, or of princes as incapable as minors; a power that enabled them, by degrees, to usurp

usurp the civil administration, and at length to transfer the title also of royalty to a new race, in the person of Pepin †.

SUCH, then, was the face of a German state. A king chosen for his illustrious extraction, attended by a numerous body of chosen youth, attached to his service in war by the strictest bonds of fidelity; a number of freemen divided into villages, over each of which was an elective chief, engaged, likewise, to military duty, but in a laxer manner; and under all these were the servants, who occupied the greatest part of the land, and supplied the freemen with the necessaries of life.

It is time now to attend a little to their domestic policy, and to inform ourselves what were the rights of each of these orders in the time of peace. The king, we are assured by Tacitus, was far from being absolute ‡. He was judge, indeed, among his own peculiar vassals, who lived on his demesne, as the other chieftains were in their respective districts. He presided in their general assemblies, and was the first who proposed matters for their deliberation. His opinion had great weight, indeed, from his rank and dignity, but his power was rather that of persuasion than of command. The royal family was no otherwise distinguished from others, than as their personal merit acquired influence, or their high birth and capability of succession engaged respect. The companions of the prince were highly honoured for their faithful attachment to him, and their valourous achievements in war; but, as to rights and privileges, were on the common footing of other freemen. The only distinction was between the chieftains, or lords of the villages, and the vassals who were under their jurisdiction. The chieftains were judges in their respective districts; but, to prevent partiality, to each of them were assigned an hundred persons, chosen among the populace, to accompany and assist him, and to help him at once with their authority and their counsel. And this institution was, in all probability, the original of the jurisdiction of the *pares curiæ* in the feudal law. Another, and a very great check on their chieftains, was their being elective, and consequently moveable every year, if their conduct was displeasing either to prince or people. These elections, as well as those of their assessors, were made in their

† L'Esprit des loix, liv. 31.

‡ De mor. Germ. cap. 7. 12. and 14.

their assemblies; where, indeed, every thing of any consequence was transacted, and therefore they deserve to be particularly treated of.

THESE conventions, then, unless they were summoned on extraordinary occasions, were regularly held once a month, on certain stated days; but such was the impatience of this people of controul, or any regularity of proceeding, that Tacitus observes, that frequently two or three days were spent before they were all assembled. For in these meetings, every freeman, that is, every soldier, had an equal voice. They appeared all in arms, and silence was proclaimed by the priests, to whom also it belonged to keep the assembly in order, and to punish all disturbers of its regularity. The king in the first place was heard, next such of the chiefs as had any thing to propose, and lastly others, according to their precedence in age, nobility, military virtue, or eloquence. If the proposition displeased, they rejected it by an inarticulate murmur. If it was pleasing, they brandished their javelins; the most honourable manner of signifying their consent being by the found of their arms. But this approbation of the general assemblies was not of itself sufficient to establish a resolution. As the sudden determinations of large multitudes are frequently rash, and injudicious, it was found necessary to have what they had so determined re-considered by a select body, who should have a power of rejecting or confirming them. For this purpose the chieftains were formed into a separate assembly, who, in conjunction with the king, either disannulled, or ratified what had been agreed to by the people at large †.

SUCH then was the constitution of a German kingdom, a constitution so nearly resembling our own at present, as at first view would tempt any one to think the latter derived immediately from thence. Yet this was not the case. With respect to the Saxon times, as far as we can judge from the few lights remaining, the form of government seems very nearly to resemble this account which Tacitus gives us; but, for two centuries, at least, after the conquest, the English constitution wore a face purely feudal. The sub-vassals had long lost the privilege of being members of the general assembly, from causes that shall be hereafter attempted to be explained; and the

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† Ibid. cap. xi.

whole legislative power was lodged in the king and his immediate vassals, whose interests frequently clashing, and creating continual broils, it was found necessary, for the advantage both of the sovereign and nobles, that a proper balance should be formed. Accordingly, much at the same time in France, Spain, and England, namely, in or about the thirteenth century, the happy method of readmitting the third estate, by way of representation, was found out, with an addition very favourable to the natural rights of mankind, that traders and artizans, who before had been treated with the most sovereign contempt, were now permitted to make part of the general assembly, and put on an equal footing with other subjects †.

BUT to return to the assembly of German chieftains, or their house of lords, as I may call it; besides a share in the legislative power, they were likewise a council, to assist the king in the execution of the resolutions of the general assembly, and determined solely by their own authority all matters of lesser moment, that did not immediately affect the whole community. *De minoribus rebus principes consultant, de majoribus omnes.*

MANY other things were likewise transacted in these general assemblies, as particularly the admission of a new member into the political society. When a youth was judged capable of bearing arms, he was introduced by his relations into the assembly; and if they testified his capacity of wielding them, he was dignified with a lance and javelin by one of the chieftains, or by his father, or some other near relation. This was his *toga virilis*. Then, and not before, was he emancipated from the family he belonged to, was permitted to become a foldier, and in consequence admitted to all the privileges of a free subject. A practice that, in after ages, gave rise to the solemn and public manner of creating knights †.

THIS, likewise, was the proper place of accusing criminals of public crimes, namely such as were looked upon by those people particularly to affect the whole society; neither was it unusual, likewise, to bring hither accusations

† Muratori, *Antiq. Ital.* vol. 4. p. 160. et Seq. Mably, *Observations sur l'Histoire de France*, tom. 2. p. 96. et Seq. Madox, *Firma Burgi*, cap. 1. sect. 9.

‡ Tacit. *de mor. Germ.* c. 13. Spelman's *Glossary*, voc. Miles.

cusations of private wrongs, if the party injured was apprehensive of partiality in his own canton.

BUT the business of greatest moment, next to legislation, was, that, once in a year, in these assemblies, each village, with the approbation of the king, chose their chiefs, and their hundred assistants †. Here it was they either received a testimony of their good behaviour, by being continued in office another year, or saw themselves reduced to the rank of private subjects, if their conduct had not been acceptable. At the same time were the lands distributed to the several chieftains, which leads me to say something on the next head, their regulations with respect to property; as to which their institutions were very singular, and totally different from those of all ancient, as well as modern nations.

ALL property being then naturally divisible into two kinds, moveable and immoveable, of the first these people had but a scanty share, their whole wealth consisting in their arms, a few mean utensils, and perhaps some cattle. The use of gold and silver, in the way of commerce, was utterly unknown to them, except to a few of their nations, namely such as lived near the Rhine, and had acquired some by dealing with the neighbouring Gauls. Consequently, there was no such thing as an accumulation of wealth among them, or any great disparity in the distribution of this kind of property, over which each had uncontrouled dominion during his life. But as testaments, or last wills, were unknown amongst them, upon death, the right went according to the plain dictates of nature. Tacitus saith, "To every man his own children were heirs and successors. For want of them, his nearest of kin, his own brothers, next his father's brothers, or his mother's." Whatever there was, was divided among the males next in degree; save that to each of the females, a few arms were assigned, the only dowry in use among those people; a dowry which, as Tacitus saith, signified that they were to share with their husbands in all fortunes of life and death. Accordingly, they constantly attended them to the field, were witnesses of their valour, took care of the wounded ‡; and often, if their party had the worst, they ran into the ranks, and by their presence and danger, animated the men to renew the charge.

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† Tacit. de mor. Germ. cap. 12.

‡ Hi cuique sanctissimi testes, hi maximi laudatores. Tacit. de m. G. c. 7. Consult also c. 5. and c. 18.

BUT with respect to real or landed property, the case was very different. Here a man had only the use, or enjoyment of the profits; and that, too, but a temporary one. The real property, or *dominium verum*, was lodged in the community at large; and was, at the end of every year, cantoned out, and distributed to the several tribes of the people; and the portion assigned to each was after that subdivided to the respective individuals; who by these means were perpetually removed from one part of the territory to another; nor could any man tell in what place his lot was to fall the next year †. And this custom, absurd as it seems to us, they were so fond of, as to continue for some time after they settled in the Roman territories; until, growing by degrees acquainted with the conveniencies of life, a change of manners was introduced, and they wished for more settled habitations. Then came into use grants for terms of years, after for life, and lastly, estates descendible to heirs, which are those we, properly speaking, called *fiefs*. This continual removal of habitation, so intolerable to a people any way accustomed to comfortable dwellings, was no manner of inconvenience to them. Their little substance was easily removed, and two or three days were sufficient to erect a sorry hovel, which contented the wishes of the greatest among them ‡. But their passion for this constant change of place seems derived from that condition which I have already observed they were in, namely, a middle state between hunters and shepherds; and that they still retained that practice, was an evidence that they had not been long reclaimed from a savage life. Tacitus indeed says, that, in the intervals of war, they were not much employed in hunting, but lived a lazy and inactive life. This, however, I apprehend, must be understood only of a few nations, nearest to the Romans, where game was not so plentiful, and not of all

† It is to be wished, that our ingenious Professor had here entered more at large into the history of property in land. The subject is important and little understood. The conceptions entertained by the antient inhabitants of Germany and Gaul concerning property have been explained and illustrated in a book, intituled, "An Historical Dissertation concerning the Antiquity of the English Constitution." The author of this treatise seems to be the first who has remarked that land is originally the property of nations, and has attempted to account for the manner in which it comes to descend to individuals. See his Dissert. part 1. sect. 3. See also Professor Millar's valuable work on the Distinction of Ranks in Society, p. 165. et seq. 2d edition.

‡ Cæsar, de bell. Gall. lib. 4. c. 1. Lib. 6. c. 22. Tacit. de mor. Germ. c. 26.

all the Germans in general: for it is certain the Franks had a strong passion that way, after they were settled in Gaul; and from them the plan of the forest laws, so justly complained of in England, after the conquest, was derived. And true it is, that whole nations, as well as individuals, were possessed with this rambling inclination; and that, not always with a view of settling in a better country. If the Germans changed their barren wilds for the warm sun and fertile climate of Gaul, we are assured by the same authority, that many tribes of the Gauls, on the other hand, removed to the forests of Germany. If Jornandes tells us, that the Goths quitted the bleak and barren mountains of Scandinavia for the pleasant banks of the Danube, he likewise informs us, that, afterwards, they returned back into their native country.

As to their methods of administering justice, I have already observed, that their chieftains, in the several districts, assisted by their assessors, were their judges. Before them all causes were brought, which were not discussed in their general assemblies; but as to the manner of investigating the truth, all the German nations did not agree. Nay the Salian Franks differed considerably from their brethren, the Ripuarian Franks. If the judge, or his assessors, or any of them, had knowledge of the fact in dispute, which often happened, as these people lived much in public, and in the open air, they gave sentence on such their knowledge. This was common to them all; but if there was no such knowledge in any of the *pares curiæ*, as I may call them, and the fact in question was denied, the Salians proceeded thus: The accuser or plaintiff produced his witnesses, the accused did the like; and on comparing the evidence on both sides, the judges gave sentence. If the plaintiff had no witnesses, the defendant, on his denial, was dismissed of course. If the witnesses for the plaintiff failed in fully proving the point, and yet their testimony was such, as induced a presumption which the other party was not able to remove, the trial was referred to the ordeal †. That of boiling water was the most usual among them. The manner was thus: The person suspected plunged his hand into the boiling water, which was afterwards carefully closed up, and inspected at the end of three days: If no sign of the scalding then appeared, he was acquitted; if otherwise, he was esteemed guilty ‡.

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† Du Cange, Glossarium voc. Juramentum. Georgisch, corp. juris Germanici antiqui.

‡ Spelman, Gloss. voc. Lada et Ladare. Struv. Hist. jur. criminal. sect. 9.

It is strange that any people should, for ages, make use of such a method, which a very little reflection, or common experience, might easily satisfy them had no manner of connection with guilt or innocence. But, besides the gross superstition of these nations, who thought the honour of providence concerned in the detection and punishment of criminals, Montesquieu hath given us another reason for this practice, which, whether just or not, for its ingenuity, deserves to be taken notice of. He observes, that the military profession naturally inspires its votaries with magnanimity, candour, and sincerity, and with the utmost scorn for the arts of falshood and deceit. This trial, then, he imagines calculated to discover plainly to the eye, whether the person accused had spent his whole life in the arts of war, and in the handling of arms. For if he had, his hands would thereby have acquired such a callousness, as would prevent any impression from the boiling water, discernible at that distance of time. He therefore was acquitted, because it was presumed he would not screen himself by a falshood. But if the marks appeared, it was plain he was an effeminate soldier, had resisted the force of education, and the general bent of his countrymen; that he was not to be moved by the spur of constant example, that he was deaf to the call of honour; and consequently such a person whose denial could have no weight to remove the presumption against him †.

THESE were the methods of trial among the Salians, but the Riparian Franks, the Burgundians, and several other German nations acted very differently. No witnesses were produced among them on either side, but they contented themselves with what were called negative proofs; that is, the person accused swore positively to his own innocence, and produced such a number of his relations as the custom of the country required: or if he had not relations enough, the number was made up out of his intimate acquaintance: These were to swear that they believed his oath to be true, and upon this he was acquitted. But if he declined the oath, or could not produce a sufficient number of compurgators, he was found guilty; a practice that fully proves these nations were, when this method was introduced, a people of great simplicity and sincerity ‡.

BUT

† L'Esprit des loix, liv. 28. ch. 17.

‡ Georgisch, corp. juris Germanici antiqui, p. 347. and p. 368.

BUT as, by this means, every profligate person, with the assistance of a few others as wicked as himself, was sure to escape, the defects of this kind of trial introduced another, or rather revived an antient one, no less inconclusive. Antiently, the Germans had no judicatures for the decision of private wrongs; but each in person took his own satisfaction, and this introduced perpetual combats. When the new method of trial came in use, a party seeing his adversary ready to defeat his just demands, and screen his injustice with perjury, resorted to his antient right, refused to accept the oath, and appealed to the providence of God by the trial of battle: a method as absurd, indeed, as the former, but peculiarly adapted to the way of thinking of the Germans, who frequently, before they entered into a war, prognosticated the success of it from the event of a combat between one of their own nation, and a captive of the enemy †. This kind of trial gained ground among all the descendants of this ferocious people ‡, and introduced itself at length among the Salians, who had it not at first, and who, by admitting positive proofs, had no need of it; and, though long-fallen into disuse, hath left behind, its offspring, private duelling. It hath been long since observed, that this fashionable custom owed its origin to these northern nations, the ancestors of the present inhabitants of Europe, as no other nations, antient or modern, however martial or disposed to war, had any knowledge or practice of it; but it is undeniably evinced by this, that as a lie, above all other provocations, is the strongest, and what lays gentlemen of honour under an indispensable necessity of duelling, so were *you lie* the very words mutually given and received in old times, the accustomed form of joining issue by battle, after which neither party, without perpetual infamy and degradation from his rank, could recede.

I HAVE taken the more notice of these four different methods of trial among the old Germans, as every one of them has been received into England. Concerning the first, the trial by witnesses, little need be said. As it is the fairest, and the justest, it has accordingly, pursuant to the practice of all civilized nations, prevailed over all the rest; and it is that, and that

† Du Cange, Gloss. voc. Duellum. Spelman, voc. Campus. Selden's Duello; or Treatise on Single Combat, ch. 5.

‡ Georgisch, corp. juris Germanici antiqui, p. 980, 1063, 1223, 1267, 1270.

that only, that we use at this day. But the ordeal also was in use among the Saxons, and continued some time after the Norman conquest; as appears, not only by the old records of the law, but from the famous story, whether true or false, of queen Emma, mother of Edward the Confessor, and the plow-shares†. The trial by negative proofs, though out of practice, is still in being, in what is called by us the *wager of law*; where, if a person is impleaded in an action of debt, on a simple contract, he may clear himself, by swearing he oweth it not, and by producing eleven others, who swear to their belief that he has deposed the truth‡. Hence it has happened, that, for a long time past, *actions of debt*, in such cases, have not been brought, but another, called an *action on the case*, is the usual method, which admits the parties on both sides, as to the point of debt, *vel non debet* to an examination of witnesses. For the last, the trial by battle, our old books are full of it, in real actions; and although, to prevent the inconvenience and uncertainty of it, the grand assize was invented; yet was it in the tenant's, that is, the defendant's option, to choose which method of trial he pleased. The latest instance of joining issue by battle, I have met with, is in Dyer's Reports, in the beginning of Elizabeth's reign||; but by this time it was so much discouraged, that, by force of repeated adjournments, the parties were prevailed on to agree, and judgment was at length given upon the failure of one of the parties appearing on the day appointed for the combat.

WHEN the truth, by some of the methods above-mentioned, was ascertained, judgment was to be given. Here it will be proper to observe, that, among these people, there were only two kinds of crimes, that were looked upon as public ones, and consequently capital. The first was treason, or desertion in the field, the punishment hanging; the second cowardice, or unlawful lust, for they were strict observers of the nuptial band, the punishment

† Selden, *Analec̃ta Anglo-Britannica*, lib. 2. cap. 8.

‡ Brady's *Hist. of England*, p. 65.

|| Mr Barrington has remarked, that "the last trial by battle in England was in the time of Charles I. and that it did not end in the actual combat." *Observations on the Statutes*, 3d edition, p. 202. The last instance which occurs of the judicial combat in the history of France, was the famous one between M. Jarnac and M. de la Châtaignerie, A. D. 1547. Dr. Robertson's *Charles V.* vol. i. p. 298.

ment stifling in a morass, with an hurdle over them. It seems, at first view, surprising, that murder, which Tacitus assures us, from sudden gusts of passion, and intemperance in liquor, was very frequent, should not, as it so much weakened the strength of the nation, be considered as a criminal offence, and punished accordingly †. But a little reflection on their situation will reconcile us to it. The person slain was already lost to the society, and if every murder was a capital offence, the state would lose many of its members, who were its chief supporters. Besides, if the slayer had no hopes of mercy, nothing else could be expected than his desertion to their enemies, to whom he could be of infinite service, and to them of infinite detriment, from his knowledge of their strength and circumstances, and of the passes into their country, through the morasses and forests, which were their chief defence. Murder, therefore, like other lesser crimes, was atoned among those people, as it was among the ancient Greeks, who were in pretty similar circumstances, in the heroic times, as Ajax assures us in these words, in the ninth Iliad :

Και μὲν τις τε κασιγνήτοιο φάρσιον

Ποιήν, ἢ τε παῖδος ἐδίδαστο τεθνεώτοιο,

namely, by a satisfaction of cattle, corn, or money, to the persons injured, that is, to the next of kin to the deceased, with a fine to the king or lord, as an acknowledgment of his offence, and to engage the society to protect him against the future attempts of the party offended. These satisfactions were not regulated originally, nor fixed at any certain rate, but left to the discretion of the injured, or next of kin. However, if he appeared extraordinarily unreasonable, and refused what was judged competent, the society, upon payment of his fine to their head, took the offender into protection, and warranted his security against the attempts of the other party, or his friends. After these nations were settled in the Roman empire, these satisfactions for each offence were reduced to a certainty by their laws ‡.

THIS is as much as I have thought necessary to observe at present, concerning the manners and customs of these people, while they remained beyond the Rhine. It will next be proper to see how far afterwards they retained them, and what alterations were introduced by their new situation.

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LECTURE

† Tacit. de mor. Germ. cap. 12. and 25.

‡ Lindenbrog. Cod. Leg. Antiq. p. 1404. Tacit. de mor. Germ. c. 21. Ll. W2l. by Wotton, p. 192. 194. Ll. Anglo-Saxon. ap. Wilkins, p. 18. 20. 41. Hicck. Dissert. Epist. p. 110. Georgisch, corpus jur. Germ. antiq.

LECTURE V.

The decline of the Roman empire—The invasions of the Northern nations—The manner in which they settled in the Roman provinces—The changes insensibly introduced among them in consequence of their new situation—The policy and condition of the Franks after they had settled in France—The rise of the feudal law—Estates beneficiary and temporary.

IT is full time now to quit the wilds of Germany, to attend these nations in their passage into the Roman dominions, and to take a view of the manner wherein they settled themselves in these new countries. The Roman empire had been long on the decline ; but especially, from the time of Severus, it every day grew weaker. This weakness arose, in a great measure, from an excessive luxury, which disqualified not only their great ones, but the bulk of the Roman people for soldiers ; and also from the tyrannical jealousy of their emperors, who were afraid of trusting persons of virtue or ability, and had no other method of supporting their authority, than by employing numerous standing armies, that, under them, pillaged and oppressed the defenceless populace ; and lastly, from the licentiousness of the soldiery, who made and unmade emperors according to their wild caprices. Hence proceeded many competitions for that dignity, and continual battles and slaughters of their men at arms ; the natural consequence of which was, that whoever prevailed in these bloody contests, always found himself less able and powerful to defend the empire from foreign enemies or domestic competitors, than his predecessor was †.

ABOUT the year 200 after Christ, the several nations who had been hitherto cooped up beyond the Rhine and the Danube, and kept in some awe by the terror of the Roman name, began to gather some courage from the weakness of the empire ; and from that time few years passed without incursions into, and ravages of, some part of the southern territories, by one or other of these people ; and how redoubtable they became to that decaying

† Montesquieu on the Rise and Decline of the Roman Empire. Dr Geddes, in his Tract concerning the Nations which overturned the Empire of the Romans, p. 21.---26.

ing state, may easily be judged from the particular fondness the emperors of those days had, upon every slight advantage gained over them, for assuming the pompous titles of Gothicus, Vandalicus, Alemannicus, Francicus, &c. not for the conquest, or reducing into subjection those several people, as in antient times, but merely for having checked them, and kept them out of the Roman boundaries †.

BUT these invasions of the northern nations were a long time confined to the single views of rapine and plunder; for as yet they were not fully convinced of their own strength, and the enfeebled condition of their enemies. And perhaps they might have longer continued in this ignorance, and within their former bounds, had it not been for an event that happened about the year 370, the like to which hath several times since changed the face of Asia. I mean a vast irruption of the Hunns, and other Tartarian nations into the north of Europe. These people, whether out of their natural desire of rambling, or pressed by a more potent enemy, were determined on a general change of habitation; and, finding the invasion of the Persian empire, which then was in its full grandeur, an enterprize too difficult, they crossed the Tanais, and obliged the Alans and Goths, who lived about the Borysthenes and the Danube, to seek new quarters. The former fled westward to Germany, already overloaded with inhabitants; and the latter begged an asylum from Valens in the eastern empire, which was willingly accorded them. The countries south of the Danube were before almost entirely depopulated by their frequent ravages. Here, therefore, they were permitted to settle, on the condition of embracing the Christian faith; and it was hoped they, in time, would have proved a formidable barrier against the incroaching Hunns, and, by a conformity of religion, be at length melted into one people with the Romans. For the attaining this purpose, they were employed in the armies, where, to their native fierceness and bravery, they added some knowledge of discipline, the only thing they wanted; and many of their kings and great men were in favour at court, and either supported by pensions, or raised to employments in the state ‡.

BUT the injudiciousness of this policy too soon appeared; and indeed it was not to be expected that a people used entirely to war and rapine, and

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† Selden's titles of honour, part 1. chap. 5. § 1.

‡ Procop. de bel. Goth. ap. script. Byz. Jornandes, Paulus Warnefridus, Gregory of Tours. Mably, observations sur l'histoire de France, tom. 1. chap. 1.

unaccustomed to any other method of subsistence, could in a short time be reduced to the arts of social life, and to the tillage of the earth; or be retained in any moderate bounds, in time of peace, when, by being admitted within the empire, they saw with their own eyes the immense plunder that lay before them, and the inability of the Romans to oppose their becoming masters of it. During the life of Theodosius they remained in perfect quiet, awed by his power and reputation; but when he left two weak minor princes under the guardianship of two interested and odious regents, it was obvious they could not be bridled much longer. Though, if we are to credit the Roman historians, their first irruption was owing to the jealousy Ruffinus, the prime minister of Arcadius, entertained of Stilicho, the guardian of Honorius. This latter, it is said, ambitious of holding the reins of both empires, pretended, that Theodosius had on his death-bed appointed him sole regent of both. For, though Arcadius was now of sufficient age to govern of himself, he was, in truth, for want of capacity, all his life a minor. Ruffinus, we are told, conscious of his rival Stilicho's superior talents and power, resolved to sacrifice his master's interest rather than submit to one he so much hated; and, accordingly, by his private emissaries, stirred up both Goths and Hunns, to fall at once on the eastern empire†.

IN the year 406, these nations, so long irreconcilable enemies to each other, poured their swarms in concert into the defenceless dominions of Arcadius. The Hunns passed by the Caspian sea, and with unrelenting cruelty ravaged all Asia to the gates of Antioch; and at the same time the Goths, under the so much dreaded Alarick, with no less fury, committed the like devastations in Illyricum, Macedon, Greece, and Peneloponnesus. Stilicho, thinking that his saving the eastern empire would undoubtedly accomplish for him his long wished-for desire of governing it in the name of Arcadius, as he did the western in that of Honorius, hastened into Greece with a well-appointed army. But, when he had the barbarous enemy cooped up, and, as it were, at his mercy, the weak prince, instigated by his treacherous minister Ruffinus, sent him orders to retire out of his dominions. The Goths returned unmolested to the banks of the Danube, laden with plunder; and Stilicho went back to Italy boiling with rage and resentment; but he never had an opportunity of wreaking his vengeance on his treacherous rival.

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† Giannone's hist. of Naples, lib. 11. cap. 4.

IN the next year, Germany, furcharged with her own inhabitants, and the nations who fled from the Hunns, and, perhaps, instigated by Rufinus, to find work for Stilicho at home, sent forth her multitudes across the Rhine; and, for three successive years, the Suevians, Alans, Vandals, and Burgundians, laid all the open country of Gaul waste; and, about the same time, Constantine, a Roman Briton, assumed the imperial purple, and was acknowledged by all the Romans of that island and Gaul.

THE western empire was now utterly disqualified for defence: Stilicho, the only man whose abilities and influence were capable of saving the falling state, had been suspected of treason in aspiring to the diadem, and was put to death; and Alarick, having before effectually plundered Greece, was now acting the same part in Italy, while Honorius, shut up in Ravenna, made but feeble efforts of resistance. Twice was Rome besieged, once redeemed by an immense ransom, and the second time taken, plundered and burnt. At length these calamities a little subsided; Constantine, the British usurper of the empire, died; and all the western Romans again acknowledged Honorius; but the western empire, though she lingered some time, had received her mortal wound, and utterly perished in less than fifty years. The distressed emperor Honorius granted to the Burgundians, who were the most civilized of these barbarians, and had embraced the Christian religion, the country they had possessed themselves of, namely, Alsace and Burgundy. The Goths, who were already Christians, but of the Arian persuasion, having by this time exhausted Italy, were easily prevailed on, under Ataulphus, Alarick's successor, to settle in the south-west of Gaul, under a like grant; which country had been quitted in the year 410 by the Sueves, Alans, and Vandals, who had over-run all Spain, and divided it into three kingdoms. And thus were two kingdoms formed in the south of Gaul, the new inhabitants of which coming by compact, and under the title of the Roman emperor, behaved afterwards to the subjected Romans and Gauls not in the light of brutal conquerors. Though they themselves retained their own customs, they indulged these in the use of the Roman laws, suffered them to enjoy a considerable portion of the lands, and made no very afflicting distinctions between themselves and their subjects.

THE Burgundians, particularly, we are informed, took two thirds of the lands, the pasturage and forests, with one third of the slaves to look after their flocks, and left the remainder to the Romans, who were skilled in agriculture. They also quartered themselves in the houses of the Romans, which naturally produced an acquaintance and amity between the two nations. But one great reason, as I apprehend, of the lenity of these people to the vanished (and a similar one will account for the Ostrogoths and Lombards in Italy, afterwards, following their example, which likewise hath been taken notice of with wonder by some authors) was their neighbourhood to the Roman empire, which still continued in name in the west, and which they might well be afraid of seeing revived, under a prince of ability, if their harsh treatment alienated the conquered people's affections from them †.

BUT different was the treatment the conquered met with from the Franks, who about this same time settled themselves at a greater distance from Italy, namely, in Belgic Gaul. The Franks, above most of the other German nations, had been for a considerable time attached to the Romans, insomuch that if they did not receive their kings from them, as Claudian tells us they did from Honorius, at least the kings received their confirmation from the emperors; and they continued in this fidelity till the year 407, when they fought a bloody battle with the Sueves, Vandals, and Alans, to prevent their passing the Rhine, to invade the Roman territories. But when they found the western empire already dismembered, they thought it not convenient to lie still, and suffer other nations to share the prey entirely amongst themselves. The Salians, therefore, took possession of the present Netherlands, and the Ripuarians to their original country of Mentz and Hesse, added Treves, Cologne, and Lorrain. Some have thought these people had grants from the Roman emperor, in the same manner as I have mentioned before concerning the Burgundians and Visigoths; but I should, with others, apprehend this to be a mistake; for Ætius the Roman general left the Goths and Burgundians in quiet possession of their seats, but defeated, and obliged the Franks to repass the Rhine, which made them, after the danger was over, return with double fury; and for a long time after they treated the conquered

† Bouquet, le droit public de France, éclairci par les monumens de l'antiquité, p. 6.—10. Montesquieu, l'Esprit des loix, liv. 30. chap. 6, 7, 8, 9.

quered Romans in the stile of masters, and with many afflictive distinctions, unknown to their neighbours the Goths and Burgundians†.

MANY, in the first heat of victory, they reduced to slavery, to a servitude very different from what had been before practised in Germany, and nearly approaching to what was used by the Romans. For whatever property was acquired by these slaves or servants, who in after ages were called Villains, belonged to their masters, not absolutely, as at Rome; but the masters claimed and took possession of it, and they (I mean in France) for the enjoyment of what was permitted them, paid a stipulated tax called *census*, which was the only tax used there in those ancient times. However, they did not employ them in domestic drudgery, but suffered them to live apart, as the proper German servants had done. Their duties were uncertain, in this agreeing with those of the men of war, and differing from those of the middle rank, which I shall hereafter mention, and were of the most humiliating kind, they being obliged to attend at their lord's summons, to carry out dung, remove nuisances, and do other mean and servile offices. The number of these slaves and villains for centuries perpetually increased, from the many wars both foreign and civil, these people were engaged in, and the *jus gentium* of those ages, by which all that were taken in war were reduced to slavery; insomuch that, by the year 1000, the number of these villains was immense, whole cities and regions being reduced to that state‡.

THIS introduction of a new order of men, unknown to the original German policy, and inferior to all others, was of advantage to that which had before been the lowest, I mean the *servants*, as they were called in Germany, or *socage tenants*, as they were called in England; for the duties they paid their lords were fixed at a certain rate, which being performed, they were chargeable with no other burdens, and, though no members of the body politic, as having no share in the public deliberations, either in person or by representation, were in reality free men. These, with the addition of several of the captive Romans, who were most skilful in agriculture, were the successors of the old servants in Germany; but their numbers, from the

† Reliq. Spelm. p. 2.—7.

‡ Potgiesser, de stat. servorum, lib. 2. cap. 1. Montesquieu, l'Esprit des loix, liv. 30. chap. 14. Du Cange, voc. Servus.

the causes before-mentioned, the perpetual wars, continually decreased, great multitudes of them being reduced into the state of villainage†.

THE soldiers, who were really what composed the nation, continued for a longer time pretty much in the same state as in Germany; for a whole people do not part with their accustomed usages and practices on a sudden. They changed their habitations as before, their manner of judicature and administering justice continued the same, they met in general assemblies as usual, but, as they were now dispersed over a more extensive country, not so frequently as formerly. When they were converted to Christianity, which happened under Clovis, who, by uniting all the Franks, subduing the Alemans, and conquering considerable tracts of country from both the Visigoths and Burgundians, first formed a considerable kingdom, it was found exceedingly inconvenient to assemble every month. Thrice in the year, namely on the three festivals, was found sufficient, except on extraordinary occasions; and this method was continued many ages in France and in England. For hundreds of years after the conquest, these were the most usual and regular times of assembling parliaments.

BUT though things, in general, wore the same face as when these people remained at home, it will be necessary to observe, that a change was insensibly introducing, the king and the chieftains were daily increasing their privileges, at the expence of the common soldiers, an event partly to be ascribed to the general assemblies being less frequent, and consequently fewer opportunities occurring for the people at large to exert their power; but principally to the many years they had spent successively in camp, before they thought themselves secure enough to disperse through the country. The strictness of military discipline, and that prompt and unlimited obedience its laws require, habituated them to a more implicit submission to their leaders, who, from the necessities of war, were generally continued in command. And it is no wonder that while the authority of the inferior lords was thus every day gaining strength, that of the king should encrease more considerably. For, probably, because he, as general, was the fittest person to distribute the conquered lands to each according to his merits, he about this time assumed to himself, and was quietly allowed the entire
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† Spelman reliq. 12, 14, 248. Muratori antiq. Ital. vol. 5. p. 712.

power of the partition of lands. They were still, and for some considerable time longer, assigned in the general assemblies, but according to his sole will and pleasure, to the several lords, who afterwards subdivided them to their followers in the same manner at their discretion; whence it came, that these grants were called benefices, and are constantly described by the old writers, as flowing from the pure bounty and benevolence of the lord †.

A POWER so extraordinary in a king would tempt any one, at first view, to think that he who had so unlimited a dominion over the landed property, must be a most absolute monarch, and subject to no manner of controul whatsoever. It will therefore be proper to make an observation or two, to shew why, in fact, it was otherwise. First, then, the ascendant the lords had gained over their followers, made it extremely dangerous for the king to oppress the lords, lest it might occasion, if not a rebellion, at least a desertion of them and their people. For the bonds of allegiance, except among the companions of the king, as I observed before, were not yet fully tied. On the other hand, the interest of the lords obliged them to protect their inferiors from the regal power. Secondly, this power of the king, and of his lords under him, was not unlimited in those times, as it may appear to be at first sight, and as it became afterwards. For, though he could assign what land he pleased to any of the Franks, he could not assign any part to any other but a Frank, nor leave any one of the Franks unprovided of a sufficient portion, unless his behaviour had notoriously disqualified him ‡.

BUT the strongest reason against this absolute power in those times, is to be drawn from the common feelings of human nature. As absolute monarchies are only to be supported by standing armies, so is an absolute unlimited power over that army, who have constantly the sword in their hands, a thing in itself impossible. The Grand Seignior is, indeed, the uncontrouled lord of the bulk of his subjects, that is, of the unarmed; but let him touch the meanest of the janizaries, in a point of common interest, and he will find that neither the sacredness of the blood of Ottoman, nor the religious doctrine of passive obedience, can secure his throne. How then could

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† Bruffel, usage des fiefs, liv. 2. Selden's tit. of honour, part 2. cap. 1. § 23. and § 33.

‡ Mably, observations sur l'histoire de France, liv. 1. chap. 5. and 6.

an elective prince, in these northern regions, exercise an uncontrouled dominion over a fierce people, bred up in the highest notions of civil liberty and equality? One of their old maxims they long religiously adhered to, that is, that, in consideration of their lands, they were bound to serve only in defensive wars; so that a king who had engaged in an offensive one, had every campaign a new army to raise by the dint of largeffes; which if he had no treasure left him by his predecessor, as he frequently had, and which every king by all means was diligent in amassing, he supplied from the profits of his demefns, the *census* on his villains, or else from foreign plunder†.

BUT these people had not long been settled in their new seats, before the encrease of their wealth, and the comfortableness of their habitations, rendered a constant removal inconvenient, and made them desirous of more settled assurance in their residence, than that of barely one year. Hence it came, that many were, by the tacit permission of the king, or the lord, allowed to hold after their term was expired, and to become what our law calls *tenants by sufferance*, amoveable at any time, at the pleasure of the superior; and afterwards, to remedy the uncertainty of these tenures, grants for more years than one, but generally for a very short term, were introduced. The books of the feudal law, written many hundred years after, indeed, say that the first grants were at will, then for one year, then for more; but I own I cannot bring myself to believe that these conquerors, who were accustomed in Germany to yearly grants, could be satisfied with a tenure so precarious as under that of a year, in their new acquisitions. These grants at will, therefore, which are mentioned in those books, I understand to be after their term ended. I mean this only as to the warrior-Franks, for as to the focagers and villains, I will readily allow that many of the former, and all the latter, were originally at pleasure ‡.

ABOUT this period, as I gather from the reason and circumstances of the times, was introduced the tenure of castle-guard, which was the assignment of

† Gregor. Turonen. lib. 2. cap. 27. Usage des fiefs, par Brussel, liv. 2. cap. 6. Dissertation on the antiq. of the English constitution, part 3. § 2.

‡ Lib. feud. 1. tit. 1. Hume appendix, 2. Dalrymple, Essay on feudal property, cap. 5. § 1.

of a castle, with a tract of country adjacent, on condition of defending it from enemies and rebels. This tenure continued longer in its original state than any other; for by the feudal law it could be granted for no more than one year certain†.

IT is time now to take notice of such of the Romans as lived among the Franks, and by them were not reduced to slavery. Clovis began his conquests with reducing Soissons, where a Roman general had set himself up with the title of a king; and after he had extended his conquests over all the other states, the Franks, and some other German nations, the Armorici, the inhabitants of Brittany, who, cut off from the body of the empire, had for some time formed a separate state, submitted to him on condition of retaining their estates, and the Roman laws. Their example was soon followed by others. The Gauls who dwelt on the Loire, and the Roman garrisons there, were taken into his service. Thus was the king of France sovereign of two distinct nations, inhabiting the same country, and governed by different laws. The Franks were ruled by their customs, which Clovis and his successors reduced into writing; the Romans by the Imperial law. The estates of the one were beneficiary and temporary; those of the others were held *pleno jure* and perpetual, and now, or soon after, began to be called *allodial*. But these allodial estates were not peculiar in after times to the Romans; for as these estates were alienable, many of them were purchased by the Franks: So that we read, that when Sunigisla and Gallamon were deprived of the benefices they held as Franks, they were permitted to enjoy their estates in propriety. As the Romans were, before their submission, divided into three classes, the nobles, the freemen, and the slaves, so they continued thus divided; the nobles being dignified with the title of *convivæ regis*‡.

BUT as it was unsafe to trust the government of these new subjects in the hands of one of their nation, the king appointed annually one of his companions, or *comites*, for that purpose, in a certain district; and this was the origin of counties, and counts. The business of these lords was to take care of, and account for the profits of the king's demesns, to administer justice,

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and

† Coke on Littleton, lib. 2. chap. 4.

‡ Montesquieu, l'Esprit des loix. liv. 30. chap. 13. Du Cange, voc. Alod. Schilteri Thesaur. voc. Alod.

and account for the profits of the courts; which were very considerable, as the Roman laws about crimes being, by degrees, superseded, and consequently capital punishment in most cases abolished, all offences became fineable, a third of which they retained to themselves. They also, in imitation of the lords of the Franks, led their followers to the wars. For every free Roman, that held four manors, was obliged to serve under his count; and those that had more or less contributed in proportion. This military duty, together with an obligation of furnishing the king with carriages and waggons, was all the burden put upon them, instead of those heavy taxes and imposts they had paid to their emperors; so that, in this instance, their situation was much mended, though in other respects it was sufficiently mortifying† The greatest among them was no member of the political body, and incapable of the lowest office in the state; and as all offences were now fineable, those committed against a Frank, or other Barbarian, were estimated at double to the compensation of those committed against a Roman or Gaul. No wonder, then, that *gentilis homo*, a term formerly of reproach among the Romans, (for it signified a heathen and barbarian) became now a name of honour, and a mark of nobility; and that the Romans earnestly longed to turn their allodial estates into benefices, and to quit their own law for the Salic. And when once they had obtained that privilege, the Roman law insensibly disappeared, in the territories of the Franks, the northern parts of modern France, which are still called the *pais des coutumes*; whereas, in the southern parts, where no such odious distinctions were made by the original conqueror, the Roman law kept its ground, and is to this day almost entirely observed. These countries are called by the French lawyers the *pais de loi écrite*, meaning the Roman‡.

BUT we cannot have a complete idea of the constitution of this nation, without taking notice of the clergy, who now made a considerable figure among them. Churchmen had, ever since the conversion of Constantine, been of great consequence in the empire; but the influence they obtained among the northern barbarians was much more extensive than what they had in the Roman empire. The conversion of Clovis to the Christian religion

† Heinnecc. Elem. jur. Germ. lib. 3. § 26. Selden's tit. of hon. part 2. chap. 1. Spelman, voc. Comites.

‡ Ripuar. L. L. tit. de diversis interfectionibus, p. 160, 161. ap. Georgisch, corp. jur. Germ. Du Cange, voc. fœda.

ligion was owing to the earnest persuasions of his wife Clotildis, a zealous Christian, and to a vow he made when pressed in battle, of embracing the faith of Jesus Christ, if he obtained the victory. He and his people in general accordingly turned Christians; and the respect and superstitious regard they had in former times paid to their pagan priests, were now transferred to their new instructors. The principal, therefore, of them were admitted members of their general assemblies; where their advice and votes had the greatest weight, as well as in the court of the prince; as learning, or even an ability to read, was a matter of astonishment to such an illiterate people, and it was natural in such a state they should take those in a great measure as guides in their temporal affairs, whom they looked on as their conductors to eternal happiness. As they were the only Romans (for the churchmen were all of that nation) that were admissible into honours, the most considerable of their countrymen were fond of entering into this profession, and added a new weight to it. But if the sacredness of their function gave them great influence, their wealth and riches added not a little to it. Before the irruptions of the barbarians, they had received large possessions from the bounty of the Roman emperors, and the piety of particulars. These they were sure to possess: but their subsequent acquisitions were much greater. Though these kings and their people had imbibed the faith of Christ, they were little disposed to follow its moral precepts. Montesquieu observes the Franks bore with their kings of the first race, who were a set of brutal murderers, because these Franks were murderers themselves. They were not ignorant of the deformity of their crimes, but, instead of amending their lives, they chose rather to make atonement for their offences, by largesses to their clergy. Hence the more wicked the people, the more that order encreased in wealth and power †.

BUT, to do justice to the clergy of that age, there was another cause of their aggrandizement, that was more to their honour. As these barbarians were constantly at war, and reduced their unhappy captives to a state of slavery, and often had many more than they knew what to do with, it was usual for the churchmen to redeem them. These, then, became their ser-

vants,

† Bacon's Discourse on the Laws and Government of England, p. 11.—27. Monast. Anglican. passim. Mezeray, abr. chronol. tom. 1. p. 172.

vants, and tenants, where they met not only with a more easy servitude, but were, from the sacredness of the church, both for themselves and their posterity, secured from any future dangers of the same kind. It was usual also for the unhappy Romans, who were possessed of allodial estates, and saw themselves in danger, by these perpetual wars, of not only losing them, but their liberty also, to make over their estates to the church, and become its socage-tenants, on stipulated terms, in order to enjoy the immunities thereof.

By all these means the landed estates of the clergy grew so great, that in time the military power of the kingdom was much enfeebled: for though they were obliged to furnish men for the wars, according as the lands they held were liable to that service, this was performed with such backwardness and insufficiency, that the state at one time was near overturned, and it became necessary to provide a remedy. Charles Martel, therefore, after having delivered the nation from the imminent danger of the Saracen invasion, found himself strong enough to attempt it. He stripped the clergy of almost all their possessions, and, turning them into strict military tenures, divided them among the companions of his victories; and the clergy, instead of lands, were henceforth supported by tithes, which before, though sometimes in use, were only voluntary donations, or the custom of particular places not established by law †.

IN my next lecture I shall consider the introduction of estates for life into the feudal system, and take notice of the consequences that followed from thence.

† Montesquieu, *l'Esprit de Loix*, liv. 30. chap. 21. liv. 31. chap. 9. 10. 11.

LECTURE VI.

The introduction of estates for life into the feudal system—The nature and forms of investiture—The oath of fealty, and the obligations of lord and tenant.

IN the preceding lecture I took notice of the different condition and situation of the Romans and barbarians in the infancy of the French monarchy; but it will be necessary to observe, that all the barbarians themselves were not subject to the same laws and regulations. When the Ripuarian Franks, after the murder of their sovereign, submitted to Clovis, it was under an express condition of preserving their own usages. The same privilege he allowed to the Allemans, whom he conquered, and to such parts of the Burgundian and Gothic kingdoms as he reduced to his obedience. The customs of all these several people, as they were Germans, were indeed of the same spirit, and did pretty much agree; but in particular points, and especially as to the administration of justice, they had many variations; and these the several nations were fond of and studious of preserving. What was peculiar to these people, above all other nations, was this, that these different laws were not local, but personal: for although the Salians, in general, dwelt in one part of the country, the Ripuarians in another, the Allemans in a third, &c. yet the laws were not confined to these districts: but a Salian, in the Ripuarian territories was still judged by his own, the Salian law; and the same was true of all the others. Another peculiarity was, that the barbarians were not confined to live in the law they were born under. The Romans, indeed, could not pass from their Roman law to that of any one of their conquerors, until they were allowed, several ages after, to acquire fiefs; but any of the barbarians, if he liked another law better than his own, could adopt it: a privilege, I presume, derived from that antient practice which they used, of removing from one state or commonwealth to another, or of going forth to form a new one.

IN the French monarchy, then, there were five different nations, besides the Romans, governed by five distinct laws; but these five people, being
all

all of the same northern original, and descended from the conquerors of Gaul, were, in the state, every one of them esteemed and regarded on an equal footing, enjoyed the same privileges, and equally received benefices from the king or other lords. I have already observed, that the bonds between the king and his companions in Germany continued during their joint lives. It had the same duration after they settled in Gaul; where they either presided with him in his court, as they had done formerly, or were settled in benefices near him, and in such situations as they might readily attend him on occasion; or else were the governors and leaders of the free Romans, under the title of counts. But all the grants of lands or offices that they enjoyed were, as yet, but temporary. So that they were *fideles*, or vassals, bound by an oath of fealty for life; but there were no fiefs, or feudal tenures, if we may call them by that name, that continued for so long a term †.

THE introduction of beneficiary grants for life, as is very properly conjectured, was first owing to the counts. They had, as I mentioned before, the third part of the profits of the courts in their respective districts, which made their office not only considerable and honourable, but opulent. They lived apart from the other barbarians among the Romans, whose allodial property was fixed and permanent. It was natural for them to wish the continuance of their lucrative employments, and to make them as perpetual as their obligation of fidelity was; and this they were enabled to attain by the means of the profits they made of their places, and the want of treasure, which the kings frequently laboured under to support their wars: for offensive ones they could carry on in no other manner than by ready treasure. The counts, therefore, by the dint of presents, or fines, attained, or I may rather say, purchased estates for life in their offices; but these estates had, at first, continuance only during the joint lives of the granter and grantee ‡.

BUT the matter did not stop here. The example was quickly followed by the other barbarians, who were the immediate tenants of the crown, and

† Lib. 1. Feud. tit. 1. Hammeton, de jur. feud. p. 139. Du Cange, voc. Fideles et Fidelitas.

‡ Mably, Observations sur l'histoire de France, liv. 1. chap. 6. Du Cange voc. Beneficium.

and who now were growing weary of the constant, or even a frequent change of habitation. And, in one respect, this allowance was of considerable advantage to the king, as it created a tie upon them, equally durable with that by which his companions were bound to him, and wore out by degrees that principle they had before retained, that by throwing up what they held from him, they were absolved from their allegiance. They, therefore, as well as the companions, took the oath of fealty; which, as far as I can find, was taken by none on the continent, whose estates were less than for life; though, in the law of England, it is a maxim, that fealty is incident to every tenure but two, namely, estates at will (for they did not think it reasonable that a person should bind himself by oath, in consideration of what might be taken from him the next day) and estates given in frank almoigne, or free alms, that is, to religious houses, in consideration of saying divine service, and praying for the donor and his heirs; and these were excused out of respect to the churchmen, who were supposed not to need the bond of an oath, to perform that duty to which they had dedicated themselves, and also because the service was not done to the lord, who gave the land, but to God.

THUS estates for life, created by particular grants, went on continually encreasing in number, till the year 600, by which time almost every military tenure, castle-guard excepted, was of this nature. And this accounts for the particular regard the feudal, and from it our law shews to the tenant of the freehold, and the preference given to him above a tenant for years. For, first, his estate was, generally, more valuable and permanent, as long terms were then unknown; and, secondly, it was more honourable, as it was a proof of a military tenure, and of the descent of its possessor from the old German freemen. For it was a long time after that socage lands, in imitation of these, came to be granted in the same manner, for life. The lords, or immediate tenants of the crown, having, by the means aforementioned, gotten estates of continuance, and being bound for life to the king, thought it their interest likewise to connect their tenants as strictly to them, by granting them freeholds also; but in the oath of these sub-vassals, which they took to their lords, there was an exception of the fealty due to the king, from whom the land was originally derived, or of a former lord, if such an one they had, to whom they were bound by oath before. These

sub-vassals, likewise, had not in those early times, the power of creating vassalages, or estates for life, under them; for it was thought improper to remove the dependence of any military man on the king to so great a distance; and indeed it was hardly worth any man's while, if it had been lawful, to accept such a gift as was determinable either on the death of the superior lord, or of his vassal, who had granted it, or lastly, on his own death.

ESTATES for life being now become common, and in high estimation, it was thought proper that they should be conferred with more form and solemnity, and that by means of what the feudal law calls Investiture, of which there are two kinds. The first, or proper investiture, was thus given: The lord, or one empowered by him, and he that was to be tenant, went upon the land, and then the tenant, having taken his oath of fealty, the lord, or his deputy (or attorney, as our law calls him) gave actual possession to him, by putting into his hand a part of the premises, in the name of the whole, as a turf, a twig, or a hasp of the door, in the presence of the *pares curiæ*, that is, of the other vassals or tenants of the lord. This is what our law calls giving livery and seisin, from the lord's or his deputy's delivering, and the tenant's taking seisin, for so the possession of a freehold or estate for life is called. The presence of the *pares curiæ* was required equally for the advantage of the lord, of the tenant, and of themselves; of the lord, that, if the tenant was a secret enemy, or otherwise unqualified, he might be apprised thereof by the peers of his court, before he admitted him; and that they might be witnesses of the obligation the tenant had laid himself under of doing service, and of the conditions annexed to the gift, if any there were, which the law did not imply: for the benefit of the tenant, that they might testify the grant of the lord, and for what services it was given; and lastly, for their own advantage, that they might know what the land was, that it was open for the lord to give, and not the property of any of the vassals; and also that no improper person should be admitted a par, or peer of their court, and consequently be a witness, or judge, in their causes †.

HENCE

† Spelman's Gloss. voc. Feodiem. Dalrymple on Feudal-Property, chap. 1. Hume, Append. 2.

‡ Du Cange, voc. Investitura. Spelman, voc. Pares Curia. Craig de feud. lib. 2. dieg. 2.

HENCE it is, that in our law, if a man has right to enter into several lands in the same county, an entry into one of them, in the name of all, is sufficient to vest the seizin, that is, the possession of the freehold of all, in him; because the same *pares curiæ* (who were in antient times the only witnesses allowed) who know he had in their presence entered into one, know also that he entered that one in the name of all the others; but if the lands lie in different counties (which are distinct jurisdictions, and have different *pares curiæ*) an entry into one county, in the name of the whole, is not sufficient; because, as to seizin of lands in the other county, the *pares* thereof are the only competent witnesses.

As the proper investiture required the actual going upon the lands, which was often inconvenient, the improper investiture was introduced. This, which was the second kind mentioned, was also performed in the presence of the *pares curiæ*, thus: The intended tenant, in a most humble and lowly manner, prays the grant of such an estate from his lord; which, when the latter has agreed to, he invests him, by words signifying his grant, and what it is of, accompanied by some corporeal action, as delivering him a staff, a ring, a sword, or clothing him with a robe, which last, being the most common method amongst the great immediate tenants of the king, gave rise to the name *investiture*. After this, the tenant did fealty. But this improper investiture did not transfer the actual possession of the land without subsequent livery and seizin, and gave the tenant not a right to enter, but only a right of action, whereby he might sue, and oblige the lord to transfer it by an actual livery. For all these lands, being liable to services arising out of the profits for which the lord was bound to answer to the king, his possession of these profits by their rules was continued, until he had, by an act of public notoriety, namely, by giving livery and seizin on the land, put it out of him. And this maxim was, I apprehend, established also for the benefit of the co-vassals, who could better judge by their own eyes, on the spot, whether an injury was done by the grant to any of them, than by hearing the lands named and described elsewhere, as, in such case, it frequently happened that all the vassals were not present †.

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† Bracton, lib. 2. cap. 17. Spelman, voc. Fidelitas, et Seisina. Fleta, lib. 3. cap. 15.

HENCE, if the lord had granted lands by an improper investiture to A, and had afterwards, by livery and seizin, granted them to B, they became B's, though he was the later invested; and the remedy A had against the lord was not for the lands themselves, for those he had already legally parted with to B, and could not recal, but for their value, in consideration of his having bound himself to fealty.

THIS was the form and manner of proper and improper investitures in the early times, before these barbarians had learned the use of letters, and was intended not merely for solemnity, but also to create such a notoriety of the fact, as it might easily be proved by *viva voce* testimony. For if it was denied, the tenant produced two or more of the *pares curiæ*, each of whom swore he had either been present at the investiture himself, or had constantly heard his father declare, that he was. And this, at first, was the only evidence admissible, and was abundantly sufficient, when the grants were only for one life. Such proof, however, could not be of any advantage to the church; for, though churchmen die, the church doth not, but continues to be represented in a succession of natural persons. If she, therefore, had not a more permanent evidence to produce than what I have before-mentioned, she could never, after some length of time, ascertain her rights. On this account *brevia testata*, or, as we call them, deeds, were made use of, which were written instruments, expressing the grant, and its nature, attested by some of the *pares*, and authenticated by the seal of the lord, or by his name and sign of the cross. When this kind of evidence was once introduced, as it was more fixed and certain than the frail memories of men, it became customary for the tenant, who had been invested either properly or improperly, to demand and obtain a *breve testatum* of that investiture, and afterwards other symbols in improper investitures went out of use, and the delivery of a deed became the ordinary sign; but this, as all other improper investitures, required a subsequent actual livery and seizin.

HAVING thus delivered the antient and proper method of constituting an estate for life, let us attend to the consequences, and see what were the several rights and obligations of the lord and tenant, and for that purpose examine the oath of fealty.

THE general oath of fealty on the continent was thus: *Ego N. vassallus, super hæc sancta Dei evangelia, juro, quod ab hac hora in antea usque ad ultimum vitæ meæ diem, tibi M. domino meo, fidelis ero, contra omnem hominem, excepto summo pontifice, vel imperatore, vel rege, vel priore domino meo*, as the case was. In England, Littleton gives this account of it. When a freeholder doth fealty to his lord, he shall hold his right hand on a book, and shall say thus: Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you; and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned; so help me God, and his saints; and he shall kiss the book †.

THE only differences are, that the words *ab hac hora in antea usque ad ultimum vitæ meæ diem* are omitted: for abroad none but tenants for life swore fealty. In England termers for years did; and that *contra omnem hominem, excepto, &c.* though implied, is likewise omitted; which exceptions, however, in the English law, were inserted in the doing of homage which the tenant in fee did to his lord.

SUCH was the general oath of fealty; but to shew what *being faithful and true*, and *bearing faith* comprehends, it will be proper to insert, from the seventh title of the second book of the feudal law, the larger oath, which persons, rude and ignorant of what the word fealty implied, were to take. It runs in these words: *Ego juro, quod nunquam scienter ero in consilio, vel in facto, quod tu amittas vitam, vel membrum aliquod, vel quod tu recipias in personâ aliquam læsionem, vel injuriam, vel contumeliam, vel quod tu amittas aliquem honorem quem nunc habes, vel in antea habebis; & si scivero, vel audivero, de aliquo, qui velit aliquod istorum contra te facere, pro posse meo, ut non fiat impedimentum præstabo. Et si impedimentum præstare nequivero, quam cito potero, tibi nunciabo; & contra eum, prout potero, auxilium meum tibi præstabo; & si contigerit, te rem aliquam quam habes vel habebis injuste vel fortuito casu amittere, eam recuperare juvabo, & recuperatam omni tempore retinere. Et si scivero te velle juste aliquem offendere, & inde generaliter vel specialiter fuero requisitus, meum tibi, sicut potero, præstabo auxilium. Et si aliquid mihi de*
secreto

† Spelman, Gloss. p. 266. Feud. lib. 2. tit. 6. Littleton, lib. 2. chap. 2. Basnage, coutume réformée de Normandie, tit. Des fiefs et droits Feodaux, art. 107.

secreto manifestaveris, illud, sine tua licentia, nemini pandam, vel per quod pandatur faciam; & si consilium mihi super aliquo facto postulaveris, illud tibi dabo consilium, quod mihi videtur magis expedire tibi; & nunquam ex persona mea aliquid faciam scienter, quod pertineat ad tuam vel tuorum injuriam vel contumeliam.

BESIDES the negative obligations, of doing nothing to the prejudice of the lord or his family, the positive ones the vassals lay under may be reduced to the two heads of counsel and aid; which, with us, are still the principal duties that the parliament, who are, or represent the vassals of the king, owe to the sovereign. Under counsel, not only giving faithful advice, but keeping his secrets was included. Aid may be either in supporting his reputation and dignity, or defending his person or property. Under the first, the vassal was not only to shew him the highest reverence, but was forbid to accuse or inform against him, except in the case of treason, where the supreme lord was concerned. He could not in a suit between them tender to his lord the oath of calumny, whereby he should be obliged to swear he thought his cause was just, and that he did not carry it on with an intent to harass and distress; for this was throwing an aspersion on his lord's character. He could not, for the same reason, bring any action against him, whereby he might be defamed, and particularly the interdictum *unde-vi*, which was a charge against the person sued, of an unjust and violent dispossession of property. Neither could he, in any cause that was not strictly feudal (for in such as were for the general preservation of that polity, he was permitted) bear witness against him. And, lastly, he was obliged to support his dignity, to attend his courts, and do suit and service, as a witness and a juror.

By aid to his person, he was not only obliged to defend his lord, if attacked personally, but to assist him in his wars, and that at his own expence, out of the profits of his tenancy; and if, in the field of battle, he deserted his lord, before his lord was mortally wounded, it was an absolute forfeiture. But this aid he was not obliged to give until required; for perhaps the lord did not need the aid of all his tenants; and the vassal, without notice, was supposed ignorant that there was any occasion for his assistance, unless it could be proved the vassal knew his lord's danger, when the lord himself
did

did not; or that he knew it was so imminent as not to give the lord time to summon him; in which two cases, he was obliged to serve without requisition†.

BUT here some distinctions must be taken notice of as to the nature of these wars. I have often repeated that the king's companions were bound to assist him in all his undertakings, offensive or defensive; and that the other freemen were obliged only to serve in defensive wars. But now, by this new introduction of grants for life to the freemen, the case was altered. In all defensive wars, they were obliged to aid their lord, though he had been the unjust aggressor, and this for the preservation of the society to which they belonged; but in offensive ones, it was to be considered whether the cause was just, or doubtful, or notoriously unjust. In the two first cases, he was obliged to furnish his aid; for if his lord's quarrel was doubtful, the respect and reverence he owed him, and his regard to his lord's character and dignity, laid him under a necessity of presuming in his superior's favour. But if the war was notoriously unjust, he was at liberty to serve, or not, as he pleased. And the aid he was bound to give, where he was bound, was against all persons, *contra omnem hominem*, even his parents, brothers, children, and friends, with the following exceptions. First, not against the king, who was the supreme lord of the whole; and in whose preservation and dignity every individual was concerned. Secondly, not against himself, for self-preservation is the first law of nature. Thirdly, not against his original country, though he had received a grant from a foreign lord, and afterwards war broke out between them: for by this time, the opinion of a durable obligation to the state he was born in, began to prevail among them. Lastly, not against his antient lord, when he had grants from two; for the second obligation could not annul the first. It may here be naturally asked, how such a vassal, who had two lords, was to act in case of a war between them? If his first lord's cause was just or doubtful, he was undoubtedly bound to him against the subsequent one, even in attacking him; and this was no forfeiture, for the second lord had sufficient notice of his prior obligation, by the exception in the oath of fealty. Indeed, if he, having a lord before, had omitted the exception, he justly lost his fief, for the deceit put on his latter lord. But if his first lord's cause was notoriously un-

just,

† Coke on Littleton, book 2. chap. 1. Du Cange, voc. Vassaticum. Wright on tenures, p. 55, 56..

just, he was not at liberty to assist him against the second; but by the two bonds was obliged to remain neuter*.

THIS military duty was to be done in the vassal's proper person, if he was capable of it; unless the lord was pleased to accept of a deputy. But if he was incapable himself, as often must have happened, after estates for life came in, he was allowed to serve by a substitute, such as the lord approved. Suppose, then, a man had two lords, who were at the same time at war with others, and each required his personal assistance, it was plain he was obliged to serve both, the elder lord in person, because his right was prior, and the last by deputy†.

THE aids due to the lord, in respect of his property, were, first, to aid and support him, if reduced to actual indigence, and to procure his liberty, by paying his ransom, if taken in war. It was a doubt among the feudal lawyers, whether, if the lord was imprisoned for debts, his tenants were obliged to release him; and the better opinion was, that they were, if the debts did not tend to their very great impoverishment‡.

THESE were all the aids necessarily required by the law in these antient times. For those for making his eldest son a knight, and marrying his elder daughter, came in afterwards. All other contributions and assistances were merely voluntary, though very frequent, and were originally, as they are still here, and are still called abroad, though imposed really and truly, *free gifts*.

WE are now to speak of the duty of the lord to his vassals; and on this head there is no need of enlarging much: for it was a maxim in the feudal law, that though the vassal only took the oath to the lord, and the lord, on account of his dignity, and the respect due to him from the tenant, took none; yet was he equally obliged as if he had taken it, to do every thing, and forbear every thing, with respect to his tenant, that the vassal was with respect

* Feud. lib. 2. tit. 23. and 24. Dalrymple on Feud. property, chap. 2. Wright on tenures, p. 72.

† Madox, Antiquities of the Exchequer, vol. 1. p. 653. Coke on Littleton, lib. 2. chap. 3.

‡ Du Cange, voc. Auxilium. Madox, Antiq. Excheq. chap. 15.

respect to the lord ; so that the bond was in most respects strictly mutual ; but not in all, for the lord was not obliged to support his indigent tenant, or to give aids to him ; but, on the other hand, he was obliged to warrant and defend the lands he had given to his tenant by arms, if attacked in open war, and in courts of justice, by appearing upon his voucher, that is, the tenant's calling him in to defend his right, and if the lord failed, he was bound to give lands of equal value, or, if he had not such to bestow, to pay to the tenant (in consideration of the bond for life, he had bound himself to his lord in) an equivalent in money.

As, in case of the vassal's failure in his duty, the lands returned to the lord, so, in case of the lord's failure on his side, the lands were vested in the vassal, free from all services to his immediate superior. But to the king, or lord paramount, he still owed service, in proportion to his fief ; and by this means he might become, instead of a subvassal, an immediate vassal of the king †.

HAVING mentioned the obligations on each side between lord and tenant, it next follows to see what interest each had in the lands given ; on which head I shall be brief, as these several rights were not so nicely distinguished as in after ages, when these tenures became hereditary. The lord was then to suffer his tenant to enjoy the issues and profits of the lands, he rendering the services due by the reservation of law, and the additional ones, if any such had been specially reserved. In case of failure, he had, in those antient times, a right of entry for the tenant's forfeiture. For while this military system continued in its full vigour, the smallest breach the vassal committed in his engagements was an absolute forfeiture ; but in after times, when the lands were often given upon other considerations than military service ; and when the military was often commuted for pecuniary considerations, a milder way was found out, that is, by *distress*, by which the lord, instead of seizing the lands, took possession of all the goods and chattels of his tenants found upon the lands, (for the lands were still the mark where he was to take), and kept them as a deposit, till his tenant had made

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satisfaction,

† Feud. lib. 2. tit. 25.

satisfaction, originally indeed at the lord's pleasure, for the failure in his duty†.

THE right the tenant had in the land was, that, paying the services due, he should receive the produce thereof, and turn it to his own best advantage; and that he might, if attacked in a court of justice, vouch, or call in his lord to defend his possession by arms, or otherwise. But as his tenure was precarious, and only for life, he was prohibited from doing any thing that should either hurt his lord's interest, or that of the king, in whom and his successors the inheritance was vested. Thus, he could not commit waste, by destroying houses, or cutting down trees, except what was necessary for immediate use, for repairs, firing, or tillage. He could not bequeath his tenancy, for he held only during life. He could not alienate without the consent of his lord, for he had his lands in consideration of his personal service; and although, in case of necessity, he was allowed a substitute, it was only such an one as was acceptable to the lord; whereas by alienation, the real tenant who was bound by oath to do the services out of the profits, was to lose them, and a stranger, perhaps an enemy, who was under no tie to the lord, was to enjoy them. Alienation, therefore, without the consent of the lord, was unlawful. If he consented indeed, and accepted the *allienée*, he, upon his taking the oath of fealty, became the real tenant, and the former was quit of all positive service, except honour and reverence; but still bound by his former oath from doing or suffering any thing to the prejudice of his former lord. Neither could a sub-vassal, in those early times, create a vassalage to be held of himself. The immediate vassal of the king, indeed, could, but then it was on these terms; first, that the person he granted it to was one that was of the ligeance of the king, either natural or adopted; next, that he was as capable of rendering the services as the grantor; and lastly, that the services reserved should, if not better, which was expected, be at least equally beneficial to the supreme lord as those of the original grant to the intermediate or *mesne* lord. To explain this, if the king granted ten thousand acres to his immediate vassal, for the service of ten knights, the vassal might give one thousand, indeed, or
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† Bracton, lib. 3. p. 130. Spelm. voc. *Escheata*. Glanville, lib. 7. cap. 17. Dalrymple on feud. property, p. 62. Ed. 1757. Hengham Parva, chap. 6. Coke on Littleton, b. 1. chap. 1.

any lesser number of acres to one person, for the service of one knight; but if he gave more to one, as he had attempted to hurt and lessen the benefit his superior had stipulated for, his grant was void, and in those times, when forfeitures were regularly exacted, the grant of the king to him was forfeited also †.

In my next lecture I shall say something of *improper feuds*, as they began to be introduced about the time I am now upon, and were very seldom, in those ages, granted for longer terms than for years or lives, and go on to shew by what means, by what steps and degrees, estates for life grew up into inheritances.

† Craig, de feud. lib. 2. dieg. 207.

LECTURE

LECTURE VII.

Improper feuds or benefices—Grants to the Church—Grants in which the oath of fealty was remitted—Grants to which a condition was annexed, that enlarged or diminished the estate—Grants which reserved certain other services, beside military service—Grants implying some certain service, as rent, and not reserving military service—Grants reserving no services, but general fealty—Grand serjeanty—Petty serjeanty—Grants to women—Grants of things not corporeal—Feudum de Cavena—Feudum de Camera.

HAVING, in the preceeding lecture, laid down the manner of constituting a proper beneficiary estate for life, which consisted in lands granted for the defence of the state, upon the consideration of personal military service, and the rights and obligations annexed thereto; it will be proper to mention such, (and to point out the several kinds of them) as are called improper benefices, which are those that, in one or more particulars, recede from the strict, and, in antient times, the usual nature of those grants; and this is more especially necessary, as, since the abolishing the military tenures in Charles the Second's time, all our present estates come under one or other of these heads. It was a maxim in the feudal law, that *conventio modum dat donationi*; and therefore, whatever terms the donor prescribed, though varying from the general course, was the rule by which the grant was to be regulated.

In the first place, then, all benefices granted to the church were improper ones, because given on other terms than that of military service, and because they ended not with the death of the grantor or grantee, but continued coeval with the life of the church, that is, for ever†.

SECONDLY, Grants of lands, wherein the oath of fealty was remitted; for although fealty itself was an incident, essential to, and inseparable from, every estate of life abroad, and every estate of years also in England, the ceremony of actually taking the oath might be omitted; and if the lord had

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† Craig, de feud. lib. 1. dieg. 11. and 12.

put the tenant in possession, without his having taken the oath, the tenant might enjoy without it. He was obliged, indeed, to take it whenever his lord called upon him, on pain of forfeiture; unless, in the investiture, it had been expressly remitted; in which case, he might refuse to take it, and justify his refusal by the tenor of his investiture†.

THIRDLY, All grants to which there was a condition annexed, that either enlarged or diminished the estate; as if lands were granted to two, and the survivor of them. This was an improper benefice, as it had continuance for more than one life; or if they were granted to a man for life, provided he did, or refrained from doing such an act. This was improper also, because it might have a more speedy determination.

FOURTHLY, All grants, in which certain services beside military were reserved, were also of this nature, as if the tenure was by military service and a certain rent, or any other certain duty, or by military service reduced to a certainty, as to attend, suppose forty days and no more, or by military service with a power in the tenant to excuse himself, by paying a certain sum. For the proper fief was for military service only, the occasions and duration of which were uncertain‡.

FIFTHLY, If military service was not reserved at all, but some other certain service instead thereof, as rent, the grant was an improper one, and such are our tenures, since they have been reduced to socage, which is derived from *soka* or *soka*, a plough, because their duty was originally to attend a certain number of days to plow their lord's grounds, or else to supply him with a certain quantity of corn in lieu thereof. This manner of paying in kind, namely, by corn, cattle or other necessaries, was continued every where many ages; in England, until the time of Henry the first, when they began to be commuted into money, to the great advantage of the successors of these socage tenants, whose estates were before become hereditary. For the computation being made at the rate and proportion of value between money and the necessaries of life at that time, as money grew more plentiful every day, its value continually sunk, and the price of commodities accordingly increased; in so much that the present successor of a tenant

† Ibid.

‡ Ibid.

nant at that time, who had before paid a fat ox, which was changed into twenty shillings, its then value, would now pay but the eight part of the original reservation, when the price of an ox is eight pounds. And this contributed not a little to the happy equality which now reigns among all ranks, as these baser, the socage tenures, were continually rising in value, and consequently in consideration, and coming every day nearer to an equality, in the estimation of the world, with the nobler, the military benefices †.

SIXTHLY, If no services at all were reserved, except general fealty, which could not be remitted; for it was thought reasonable, not only to grant lands in consideration of future military service, but also to reward such as had deserved eminently, and were perhaps maimed or mutilated, and so unfit for future service, with lands free from such, or any other duty.

SEVENTHLY, Grand serjeanty is a benefice of an improper nature, even though it be reckoned a military one, because it is reduced to a certainty. Grand serjeanty is a certain service done by the body of a man to the person of the king, and is of two kinds; military, which is to be done either in or out of the realm; and not military, which is to be done within the realm. Military, as when lands are given on condition of carrying the banner of the king, or his lance, or to lead his army, that is, to be his constable; or to number and array his army, that is, to be his marshal; but these being *certain* services, and due to the person of the king, they were not obliged to attend, but where he went in person; and this right they insisted on so strongly, as had almost occasioned a rebellion in the time of Edward the First; who, although in most things an excellent prince, was of an hot and haughty temper ‡.

HAVING determined to attack France on two sides; in Flanders, where he intended to command himself, and in Guienne; he ordered the Earl of Hereford, high constable by tenure, and the Earl of Norfolk, marshal by tenure, to lead the army in Guienne, as his generals and commanders in chief. But, however honourable and pleasing in other respects the offer might be, they

† Reliq. Spelm. p. 3, 7, 33, 43. Gervaf. de Tilb. Dialog. de Scaccar. lib. 1. cap. 7. Madox, Antiq. Excheq. vol. 1. p. 272.

‡ Fortescue de Laud. leg. Angl. p. 99. Ed. 1737. Coke on Littleton, b. 2. chap. 7.

they feared that such a precedent, quietly complied with, might be, in after times, a means of introducing new and hard services at the king's pleasure, instead of the antient and known ones. They, therefore, flatly refused, unless he went thither himself; offering, at the same time, to serve under him in Flanders. The king, boiling with resentment against France, and provoked at this contradiction to his pleasure, however justly founded, threatened Norfolk, in a transport of passion, with hanging; to which the other replied, with equal fierceness, and total want of respect. The two Earls retired to their estates, put themselves in a state of defence, and even committed several outrages against the king's collectors; and their cause was generally espoused by the nation, who were against the king's exacting any new and unheard-of services. The behaviour of these lords to their sovereign, and to such a sovereign, in setting him at defiance, and that with terms of disdain, when they themselves were the aggressors, was utterly unjustifiable; but, from their cause, notwithstanding this behaviour of theirs, being universally espoused by the nation, we may clearly see the opinion and judgment of those times; that their kings were not unlimited, and that they had no right to exact from their vassals any services but those that flowed from their tenures. The king, indeed, at first gave their lands and offices to others; but when he had cooled, and found they had insisted on no more than was their right, he, in the frankest manner, repaired his error. He gave in parliament a new confirmation of Magna Charta. By another statute, he renounced all right of taking talliages, that is, levying taxes, even on his own demesnes, without consent of parliament, as contrary to that charter; and in the body of this last act, in the amplest manner, remitted all disgust and resentment against the two earls and their associates; and gave them the fullest indemnity for the offences they had so outrageously committed. Such conduct in any king, whose subjects were not disposed to esteem him, might have been as a sign of weakness, and have been attended with dismal consequences; but in Edward's realms there was not a man that did not admire his wisdom, adore him for his valour, his honour, and his sincerity. He could encroach without incurring hatred, and he could retract without being thought mean; so that it may be a question, whether, by the noble manner of his repairing his mistake, he did not tie his subjects to him with stronger bonds of affection, than if he had never committed it†.

THE

† Carte, hist. of England, vol. 2. p. 169. The reign of Edward I. in Kennet's collect. of English historians, p. 197.

THE grand serjeanties that are not military are of various kinds, being offices and services done to the person of the king within the realm, in order to the support of his state and dignity; for which reason, although they are not, properly speaking, military services, yet they are looked upon in that light, and are endowed with the same privileges, and subject to the same regulations, except in a few instances, to be hereafter mentioned; so that no person under the rank of the lesser nobility, that is, of knighthood, was capable of performing them; and therefore, when, by allowing the alienation of lands, these tenures fell into the hands of persons of inferior quality, they were either knighted, or appointed a deputy of that rank. Thus, at the coronation of Richard the Second, as we find in Lord Coke, William Furnivall claimed to find a globe for the right hand of the king, and to support his hand on the day of his coronation, in virtue of the manor of Farnham, which he held by that grand serjeanty; but, though descended of a noble family, he was not permitted to perform it in person, until he had been dubbed a knight. At the same coronation, John Wiltshire, citizen of London, claimed to hold a towel while the king washed before dinner; which claim being allowed, as he was of too low rank to perform the service in person, he made Edmund Earl of Cambridge his deputy. Women likewise and minors were obliged to serve by deputy; as did, at that time, Anne Countess-dowager of Pembroke, by Sir John Blount, and her son John Earl of Pembroke, a minor, by Edmund Earl of March†.

THESE grand serjeanties, which were most of them lands granted for the doing certain duties at the solemnity of the coronation, contributing to the splendour and dignity of the crown, have been still retained, though all other military tenures have been changed into free and common socage. However, all these grand serjeanties were not for the bare purpose of attending at coronations. The lord high stewardship or seneschalship of England, of which the duty is to preside at the trials of peers, was annexed to the barony of Hinckly, which, passing into the family of Leicester, and then into that of Lancaster, in the person of Henry the Fourth was united to the crown; but ever since that time, as the powers and privileges the law threw into his hands were looked upon as too extensive, and dangerous, if continued, this officer hath only been occasionally created, as for a coronation,

† Coke on Littleton, lib. 2. chap. 8. Madox, Antiq. Excheq. vol. 1. p. 321, 326.

tion, or the trial of a peer, which ended, he breaks his staff, and the office is vacant †. The same is the case, and for the same reason, of the office of high-constable, ever since the attainder, in Henry the Eighth's time, of Edward Duke of Buckingham, who enjoyed it as Earl of Hereford. Thus did the crown get rid of two considerable checks, which concurring with other more extensive and influencing causes, helped to raise the power of the house of Tudor above what the princes of the line of Plantagenet had enjoyed ‡. The office of earl marshal, indeed still continues in the noble family of Norfolk. For, notwithstanding the attainders of that family, when they were restored, it also was restored to them. The reason is, because this office is of little power; indeed, in the vacancy of the constable to whom he is properly an assistant, scarce of any at all. It being, therefore, an honourable dignity, and attended with no danger, it is no wonder it hath remained ||. In this kingdom one grand serjeanty remained till the year 1715, in the family of Ormond, that of butlerage; but it differed from those before-mentioned in this, that it was not a service arising from a grant of lands, but of the privilege of wines, an antient profit of the crown, due by prerogative, namely, a right to take two tons of wine, one before the mast, and the other behind, out of every ship containing twenty tons or more, until Charles the Second purchased it from the Duke of Ormond by a perpetual pension of four thousand pounds a year †.

EIGHTHLY, Petty serjeanty was another species of improper benefices, and, in our law, was comprised under the general head of *fofcage*, because the service was certain. It is, as Littleton ‡ defines it, where a man holds his land of our sovereign lord the king, to yield to him yearly a bow or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows; or to yield such other small things belonging to war; so this, as well as grand serjeanty, was a

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† Madox, hist. of Excheq. vol. 1. p. 51.

‡ Ib. p. 40. 41.

|| Ib. p. 43.

† It may not be improperly remarked in this place, that about the 18th year of Henry II. Geoffrey Martell held in England the office or serjeanty of Pincernaria, or Butlership. See Madox, hist. Excheq. vol. 1. p. 50.

‡ Lib. 2. cap. 9.

tenure of the king's person, and could not be held of a subject. Such is the grant the Lord Baltimore hath in his province of Maryland; for he yields every Christmas five Indian arrows, besides a fifth of all gold and silver found within this province.

NINTHLY, All grants to women were of the nature of improper ones, because they must always serve by deputy; and personal service is essential to the proper military tenures †. But these were not introduced so early.

THE tenth kind, and the last that I shall mention, of improper benefices, are those that are of *things not corporeal*, and of which, consequently, there cannot be a possession manually delivered over, that is, they do not admit of livery and seizin, and therefore can be only conveyed by the improper investiture, that is, by words or writing, accompanied by a symbol. Such are rights in, or profits issuing out of land, where another hath the possession of it. As the feudal law distinguishes between corporeal things, whose possession can be actually transferred, and incorporeal, which cannot; so doth our law make what is the same distinction between things that lie in livery, and things that lie in grant. In the first, it regularly requires an actual livery and seizin, and here a deed is not absolutely necessary; but the second pass by the delivery of the deed. Here therefore a deed is absolutely necessary; for although the feudal law admits the use of other symbols in this case, ours, for the greater certainty, precisely requires this peculiar one, that there may be full evidence of what was conveyed. Of this last tenth kind as there are many and various species, I shall run over some of them in a cursory manner, to explain and shew their general nature.

THE first I shall take notice of is, that which, I presume, was the most antient, as it seems to have come in the place of those repasts the king gave to his comites, or companions, and is what is called *feudum de cavena*. *Cavena* signified the repository, or repositories of the necessaries of life, while in those ancient times the services due from the demesnes, or the socage lands, to the king or lords, were paid in kind. Things therefore necessary, or useful for the support of life, distributed in specie, out of the king's or lord's cellar or pantry, or both, were what the *feudum cavena* consisted in; and

† Feud. lib. 1. tit. 8.

and that this came in place of the antient constant entertainments, and feasts, of the comites, or companions, appears from this, that it was a rule, even after other grants were allowed to be hereditary, that these determined with the life of the grantor, or grantee, which ever first happened to expire. These grants likewise were of two kinds; some granted in consideration of future services, upon the failure of which a forfeiture was incurred, others, in reward for past services, where nothing was expected for the future but general fealty. This difference runs through many other of these gifts that lie in grant. For the feudal law distinguishes them into *officiosa*, that is, to which a positive duty is annexed, and *inofficiosa*, where no subsequent service is required, but general fidelity, which is incident to every tenure †.

THE second I shall mention is *feudum de camera*, which, I apprehend, was originally a substitution for what I have just mentioned, the *feudum de cavena*; for it was instead of an allowance of necessaries out of the cellar or pantry of the king, an annual allocation of a sum of money for will, life, or years, according as it was granted out of the *camera*, or chamber where the king or lord kept his money; and this was, as the other I before mentioned into whose room it came, either a reward for past services, in which case no future duty was required, or on consideration of future ones. The pensions granted by the king in our kingdom (Ireland) out of his revenue, are of the nature of the former; and the salaries to judges and other officers are of the nature of the latter. What was common to both of these, the *feudum de camera* & *de cavena*, was, that, by the feudal law, they were not due at the stated time, unless there were provisions in the *cavena*, or money in the *camera*, and that free from debts; for the lord's safety and dignity was to be first considered; but they were to wait for their arrear, till provisions or money came in.

ANOTHER thing is to be observed, that, although, at the introduction of these tenures, all others were for the life of the grantor and grantee at most, yet when the others became perpetual, these continued long after to be only for the joint lives of the grantor and grantee, namely, as long as kings and

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† Brussel, usage des Fiefs, tom. 1. p. 41. Du Cange, voc. Cavena and Canava.

great lords were considered as tenants for life, and incapable of alienating their demesnes, or laying any permanent charge upon them. But when, by the frequency of the example of alienations, and by the occasional indigence of the kings and other lords, and the desire designing persons had to take advantage of it, alienations of the demesnes were once introduced, to the prejudice of the successor, these grants, as was very natural, as they were less hurtful than an absolute alienation, were continued for the life of the grantee, though the grantor had died before†.

† Spelman, and Du Cange, *voc. Camera, et voc. Feudum. Craig, de Feud. lib. 1. Diegef. 10.*

LECTURE

LECTURE VIII.

*Feudum Soldatæ—Feudum habitationis—Feudum Guardie—Feudum Gastaldie
Feudum mercedis—Incorporeal benefices in England—Advowsons—Presenta-
tive advowsons—Collative advowsons—Donatives.*

IN the preceding lecture I began to treat of the several kinds of improper benefices, which are transferable only by the improper investiture, or, as the English law says, *lie in grant*; intending only to illustrate their general nature, without descending minutely into particulars; and of these I have already mentioned the *feudum de camera*, and that *de cavena*. I call these fiefs, even at the time I am now treating of, in conformity with the practice of the feudal writers: not with strict propriety, indeed; for *feudum*, properly speaking, signifies a tenure of inheritance, and such were not yet introduced. But before I quit them, it will be proper to take notice of some subdivisions of them, to be met with in the feudal writers.

I HAVE already observed they were either gratuitous or officious, that is, without future service, or with it. Of the first kind there were two species, that called *feudum soldatæ*, from the word *solidus*, which signified a piece of money, and was a gratuitous pension, granted either out of the charity or bounty of the lord, or in reward of past services; the other called *feudum habitationis*; which is liberty of dwelling in an house belonging to the lord, in whom the property still doth, and the possession is still supposed to remain†. Of the officious ones Corvinus mentions three kinds, *feudum guardiæ*, *feudum gastaldie*, and *feudum mercedis*.

THE *feudum guardiæ* hath annexed to it the defence of a castle, for the security of the realm; and this differs from the castle guard I have before mentioned, in as much as that, where lands were given for the defence of the castle, it was a corporeal benefice, and transferred by livery and seizin; namely, by admitting the constable into the castle, and delivering him the

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† Du Cange, voc. *Soldata*, et voc. *Feudum ædificii*.

key thereof, and was an improper one only in respect of its duration, as, in the early times, it continued only a year; but this I am now speaking of was a pension, paid out of the king's exchequer for the same purpose; and was of the same nature with the modern salaries of governors of garrisons †.

THE *feudum gastaldie* was a pension granted to a person for transacting the lord's business, as for being his treasurer, steward, agent, or receiver. The *feudum mercedis* was in consideration of being an advocate or defender of the lord. Such are grants to lawyers *pro consilio impendendo*; and the salaries of the king's lawyers, and the solicitors for the crown ‡.

I SHALL next run over briefly the several kinds of incorporeal benefices which the law of England takes notice of, and explain their general nature. And the first I shall take notice of is an *advowson*, which is a right a man hath of nominating a proper person to fulfil the duties, and to receive the profits of an ecclesiastical benefice. These rights arose thus. In the infancy of the christian church, when the clergy were supported by the voluntary contributions of the people, the bishop was chosen by the clergy and people at large; and this method was so firmly established, that when the emperors became christians, although they made great donations of lands to the church, yet they left the manner of election as they found it; and so it continued in Rome until the year 1000 at least. But these elections, made by the giddy multitude, were the occasions of infinite disorders. The value of these offices being encreased, and the manners of the ecclesiastics corrupted by the accession of riches; parties and factions were eternally forming, and supported by all methods; and when a vacancy happened, the contest was frequently not decided without bloodshed. It is no wonder that all the sober part of the clergy, who were scandalized at these irreligious practices, and the emperors, who were concerned in the peace of their dominions, concurred in remedying these evils; which was at length effected by excluding the laity, gradually, and by insensible degrees, and confining the election to the ecclesiastics. Many of the emperors, indeed, struggled hard to get the nomination to themselves, but the clergy proving too powerful for them, they obtained, at most, but a power of recommendation ||.

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† Coke on Littleton, lib. 2. chap. 4.

‡ Du Cange, voc. Gastaldus.

|| Gibson, Cod. Jur. Eccles. Anglican. tit. 23.

IN the northern kingdoms the same causes produced the same effects, as to the exclusion of the laity, but with more advantageous circumstances to the rights of these princes. For as the lands they gave to the bishops in right of their churches were held of them, so they gave the investiture; and there was a kind of concurring right between the clergy, who elected, and the king. He insisted on his right of giving the investiture, but generally received their nominee, and granted it to him.

BUT after the time of Charles Martel, when the clergy were stripped of most of their lands, things took a different turn. For when new grants were made to the church by the king, he insisted, as feudal lord, on the absolute nomination, and the giving investiture, by delivering the staff or crozier, the emblem of his pastoral care; and the ring, the symbol of his spiritual marriage with the church; but these rights were opposed by the clergy, who were strongly supported by the popes then setting up for being the feudal lords of all churchmen, and who hoped to derive, as they did, great advantage from these dissensions. From the year 1000 to 1200, great confusion subsisted throughout all Europe, occasioned by these contests, until the popes in general prevailed; but for four hundred years past, and particularly since the reformation, their power hath been on the decline; and from this last period the patronage or advowson of bishoprics hath been confessedly in our king, as hath been the case in several other kingdoms; and though in England a form of election is still retained, it is no more than a mere form †.

THE advowson, or patronage of inferior benefices, came in another way. In order to understand this, let us consider how dioceses came to be subdivided into parishes. Antiently, I mean about the year 420, the bishop had the sole cure of souls throughout his whole district, and received all the profits of it; which he and the clergy distributed into four parts, not exactly equal ones; but unequal, according to the exigences of the several interests to be considered; one to the bishop, to maintain hospitality, and support the clergy residing with him, and the Christians of other places, who were

† Montesquieu, *l'Esprit de Loix*, liv. 11. chap. 11. Bacon, *hist. and polit. disc. on the laws and government of England*, ch. 59. Inett's *hist. of the English Church*, vol. 2. ch. 2.

were often forced to fly from persecution, or travelled on their necessary concerns; one for the building and repair of churches; one for the poor, and one to support the inferior clergy, whom the bishop used to send to particular places, as his deputies, and to remove or recal at his pleasure. The clergy who lived in the city where the bishop resided, were supported by him in a collegiate way at first; until at length their particular shares were ascertained, and carved out of the general revenue of the church; and this was the origin of *chapters* †.

To return to the country clergy. The manner in which they came to have settled establishments was thus: It was usual, as soon indeed as tithes were established as a law, that is, before or about the time of Charlemagne, for the bishop to allocate to his vicar or curate in any district, the whole, or a part of the tithes or other profits arising there; but when England, France, and other countries were ravaged by the Danes and Normans, the fury of these barbarous heathens fell particularly on the ecclesiastics. Their churches they burned, and themselves they slaughtered without mercy; in-
somuch that, when their devastations ceased, there ensued not only a great scarcity of clergymen, but such a want of means of proper support for them (the old estates of the church having been turned into military fiefs) that the feudal lords were willing, for the sake of having divine service performed in their districts, for the benefit of themselves and their vassals, to alienate part of their lands to the church, which was then in indigence, for the purpose of building houses for the parson, and providing a competent glebe for him, and also for building new churches where they were wanted. Altho' alienation was at this time entirely disallowed by the feudal customs, yet the necessity of those times prevailed against it in those instances, especially as these superstitious people attacked, or ready to be attacked by an heathen enemy, thought the lands so given to be really given for military service, as they were given for the service of God, the Lord of Hosts, who was to speed their arms. However, the circumstances and opinions of that age would not allow any grant, without an acknowledgment of the superiority of the grantor; nor allow any lord to give any grant materially detrimental to his military fief. Hence, as an acknowledgment that the lands so granted to the church proceeded from the bounty of the Lord, he was allowed to
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† Gibson, Cod. Jur. Eccles. Anglican. tit. 23.

nominate a clergyman to the bishop; who, if he was qualified, was obliged to admit him. But as the patron might present an improper person, and such an one as the bishop must be obliged in conscience to reject; and might do this repeatedly, for any considerable length of time, during which the duties of religion would be neglected, it was, in after times, settled, in all countries, that the right of the patron's presentation should last only a limited time. In our countries it is six months; after which time lapsed from the vacancy, the bishop's original right of nomination revives †.

BUT the customs of those ages not admitting of the alienation of any part of a military tenure, but what was absolutely necessary, it followed that these glebes were far from being sufficient for the maintenance of a parson. These grants, therefore, were not made without the consent of the bishop, to allocate, in aid of the glebe, the tithes of that precinct, to the use of the parson. And now the parson began to have a permanent interest for life in his parish, and a permanent cure of souls therein; but not exclusive of the cure of souls in the bishop, who was concomitant with him in that point, though not in the profits. For when the bishop, for the good of the church, appropriated a part of the revenues of the church to a particular person and his successors, which, for the public good, he was allowed to do, he could not, however, divest himself, or his successor, of that general cure of souls through his whole district, which was the essence of his office. As the parson, therefore, though named by a layman, was his deputy, he was in truth (to speak by way of accommodation) his feudal tenant. From him he received institution, which is the improper investiture; to him he gave the oath of canonical obedience, which is equivalent to the oath of fealty; and by him, or persons appointed by him, he was inducted into his church, that is, had livery and seizin given him ‡.

THIS was the origin and nature of presentative advowsons, in which, though a matter ecclesiastical, the lay patron was allowed to have a temporal and a valuable interest: inasmuch as it might serve for a provision of one of his children, or any other relation that was qualified for it; and consequently be an ease to him; and as, at the time that these glebes were granted,

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† Ibid.

‡ Ibid. and tit. 30.

most fiefs were hereditary, at least none were suffered to be granted but by those who had such (because the lord superior might else be disinherited) this right of *advowson presentative* descended to the heir. The church in its distress exceedingly encouraged and fostered these rights for a time; but when her circumstances changed, and, in ages when profound ignorance prevailed both among the clergy and laity, many were the attempts to deprive the laity of their rights, and many the exclamations against the impropriety and impiety of such persons pretending to name any one to an holy office. But I do not find they ever thought of restoring to the laity the glebes, in consideration of which, for the necessities of the church, those rights were first allowed.

THUS much for *presentative advowsons*, which, I hope, from what hath been already observed, will be sufficiently understood for the present. I now must proceed to *collative advowsons*, namely, those given by the bishop, which were of two kinds; either absolutely in his own right, or by lapse, when the patron neglected to present; which was in truth but a devolution of the antient right he had parted with, to him; and therefore, as there is no substantial difference, they may well be treated of together. As the bishop in the case of lapse, collates, that is, institutes in his former right in default of the person who had the right of presentation, I observed before, that the bishop had used to grant to the country clergy a part or the whole of the tithes of the precincts they served in; but when once, by the allowance of presentative advowsons, parsons had got freeholds in them, the example became contagious, and much to the benefit of the church. Those parts of the diocese which still remained in the bishop's hands were divided into parishes; and the tithes of them, or at least a considerable part of them, were assigned to the minister for his life. I need observe no farther of these, than to say, that they differed no otherways in their nature from the last mentioned, than that, as a patron had nothing here to do, there was no presentation, and that *collation* is, in the case where the bishop hath the sole right, what is called *institution* in the case of a clerk presented.

THE third and last kind of advowsons are those called *donatives*, in the giving seizure of which the bishop hath nothing to do, such livings being privileged, and exempt from the jurisdiction of the bishop, and visitable by the patron

patron only. How these exemptions arose, when, at first, every place was a part of a diocese, and of the bishop's cure of souls, it will be worth while to inquire. The bishops of Rome, aided by their great riches, and the fall of the western empire, did, by pursuing a settled plan for many hundred years, with the greatest art and unshaken perseverance (temporizing indeed when the season was unfit, but never giving up expressly any point that had been claimed) at length, instead of being the first bishops in rank, attained to a jurisdiction over all the west, and claimed a general cure of souls, which made the bishops, indeed, but pastors under them. However, conscious of their usurpations, in order to establish them, it was necessary to depress the episcopal order.

THEY began first with dismembering bishoprics, in order to found new ones, on pretence of the churches being better served; and this they did principally in Italy, where their influence was most extensive; and that with a view, by having a greater number of votes, to over-rule the determination of the general councils. They did the same, but more sparingly, for the reason aforesaid, in other countries, with the sovereigns; who, in these cases, were really actuated by the motive of advancing the public good, and promoting religion. The next step was more decisive. Their authority being now established, they took occasion, on several pretences, to exempt from the jurisdiction of the bishops, several places within their dioceses, which they kept immediately under themselves, to which they appointed clerks by this way of donation, and whom they visited by their legates, as their immediate ordinary. The clergy, thus provided for, served as faithful servants and spies to the pope, in all parts of the christian world, and were, next to the monasteries, the firmest support of his power. The same practice they pursued with respect to bishoprics, by exempting several of them in divers places from the archbishop of the province. And this was the origin of donatives. But, in order to shew the plenitude of their power, the next step they took was of a higher strain. They not only founded donatives for themselves, but for others, even of the laity; shewing by this, that all ecclesiastical jurisdiction and discipline was entirely subject to their will, and that, at pleasure, they could transfer it to hands before judged incapable of it.

THESE two kind of donatives still subsist in England, the latter in the hands of subjects, the former of the king as supreme ordinary, since the pope's usurped power was transferred to Henry the Eighth. I am sensible many common lawyers insist that the king of England was always supreme ordinary, and that nothing new was gained at that time, but only his old authority, which the pope had usurped, restored to him. But what shall we say to the first fruits and tenths; which are certainly papal impositions, and comparatively of a modern date. The same I apprehend to be the case of the ordinary jurisdiction. As to the supreme patronage, I allow it was, originally, the king's. My reason is, that I do not find in the antient church any trace of a layman solely exercising ecclesiastical jurisdiction, or enacting laws for the church †.

IN the apostolic times all things were transacted by the *faithful* at large; in the next age, they fell into the hands of the clergy, all excepting the election of bishops, and approbation of clergymen. After the emperors became christians, they published indeed ecclesiastical laws, but that was only giving the sanction of the imperial power to the canons the church had made; whose censures, when there were such multitudes of new and counterfeit converts, were likely to have little weight. In the northern nations the case was the same. Canons were made by the clergy, and these were often enforced and turned into obligatory laws by their general assemblies, who had the legislative authority; and if there are any instances in those times of laymen exercising ecclesiastical discipline as ordinaries, I own they have escaped me. I speak merely of ecclesiastical discipline: for as to things of a temporal concern, such as wills, administrations, marriages, tithes, &c. the authority undoubtedly was from the king. But not as to matters entirely spiritual, such as concern the *salutem animæ* ‡.

I THINK therefore the king's title to be supreme ordinary, stands better settled on the parliamentary declaration, and on the reason of the thing, that all coercive power should be derived from him, whom God hath made the superintendant; than on the assertions of lawyers, that it always was so. Matters of fact are to be determined by evidence, not by considering what ought

† Gibson, Cod. Jur. Eccles. Anglican, tit. 34.

‡ Gibson, tit. 1. and 2.

ought to have been ; and we need not be surprized to find, that an ignorant and superstitious people allowed practices, and a division of power in themselves unreasonable.

IN these donatives there was neither institution nor induction. The patron gave his clerk a title by deed, on which he entered ; for the plenitude of the papal power supplied all forms. The patron was the visitor, and had the power of deprivations ; but what clearly shews, in my apprehension, that these donatives were incroachments on the episcopal authority, is, that, if once a common patron (for the king was saved by his prerogative) had presented his clerk, and he got institution and induction, the donative was gone for ever. The living became presentative, and the bishop's jurisdiction revived.

I SHOULD next proceed to tithes, another kind of incorporeal benefice ; but this would carry me too great a length for the present discourse.

LECTURE

LECTURE IX.

Tithes—The voluntary contributions of the faithful, the original revenue of the church—The establishment of regular payments—The appropriations of the church—The history and general rules of tithes in England.

THE next kind of incorporeal benefices taken notice of by the law of England, that I shall mention is *tithes*; the New Testament, as well as common reason, says, that *they who serve by the altar, should live by the altar*; but is silent as to the manner in which this support should arise. In the very first times, when their numbers were but few, and those confined to Jerusalem and its neighbourhood; the christians sold all they had, and lived out of the common stock. But this lasted a very short time. When they increased to multitudes, that method was found impracticable, so that each retained his possessions, and gave a voluntary contribution out of it at his discretion. This was the fund of the church; and in those times of fervent zeal in the laity, and simplicity of manners in the clergy, it was found abundantly sufficient, not only to support the ministers, and their own power, but also to build churches, and to do many acts of charity to some of the pagans.

THE revenues of the church went on continually encreasing to the time of Constantine; and though by the Roman laws, no *colleges*, as they called them, that is, communities or fraternities, unless they had the sanction of the imperial authority, could accept legacies or donations, yet, such was the devotion of the times, that many such private grants were made; and the principal churches obtained great acquisitions, not only in moveable goods, but in landed estates; insomuch that some of the persecuting emperors were thought to be as much instigated to their cruelties by avarice, as by their blind attachment to their pagan superstition†.

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† Father Paul on beneficiary matters, ch. 2. and ch. 6. Selden's history of tithes, ch. 4. sect. 1. Spelm. larger work of tithes, ch. 6.

IN the fourth century, the restraint being taken away, these largesses from the rich and superstitious to the church became much greater; but the general voluntary contributions from all who could spare, diminished, the apparent necessity for them being lessened; and the zeal of the people, which persecution had kept warm and fervent, slackened from ease and security. The bishops, who were the distributors, prided in vying with each other in the magnificence of their churches; and, being now raised to an eminent rank in the state, were not satisfied to live in such a manner as contented the simplicity of the antient fathers of the church; so that by the year 400, the inferior clergy and the poor were, in many places, but in very scanty circumstances. This induced many of the pious to fix upon a certain rate out of their own annual gains to supply these necessities, and as the tenth was what had been assigned to the Levites in the mosaical law, that generally became the proportion. But as the payments of those tithes were purely voluntary, so did the givers appropriate them in such manner as they pleased, and as they thought they were most wanted †.

IN Egypt, where, it seems, this practice began, they were commonly given to the monks, who had devoted themselves to a religious poverty; in Illyricum generally to the poor; in other places to the inferior clergy of such a district, or, if the church itself was indigent, to the bishop, for the use of his church. The famous preachers about this time, particularly St. Ambrose and St. Augustine, enforced this practice with all their eloquence, and insisted on the levitical law of tithes as binding on christians. This had great, but not general effects. Some gave the tithe, others, of more zeal, gave more, and others less; and though these contributions began now to be aided by the spiritual arms of excommunication, yet were these only used to oblige a man, in testimony of his being a christian, to make some offering, not to pay precisely the tenth, or any other portion ‡.

THESE payments of the tenth hitherto we see were voluntary; but there soon came in another practice, which, in particular places, made them compulsory. It was usual when a patron founded a church, in order for its support, to charge his lands with the payment of tithes to the minister who officiated

† Selden's hist. of tithes, ch. 6. and 7. Spelm. larger work of tithes, ch. 29.

‡ De non temerand. Eccles. tract. Spelm. p. 3.

ciated therein. This created a permanent right in the church, not by the force of any general law, or canon (for all such attributed to these ages are forgeries of a later date) but from the especial gift of the grantor, and the power he had to charge his land. The earliest authority that proves a general right of tithes, through any country of Europe, is to be met with in the council of Maçon, held under king Guntram, who reigned in the south-east parts of France, in the year 586. There the right of tithes, through all his dominions, is acknowledged as an antient duty due to the church; and they are enjoined to be regularly paid. But it is observable, in the very words of this law, that the tithes so paid were not solely appropriated to the clergy, but much of them applied to other charitable uses, *unde statuimus, ut decimas ecclesiasticas omnis populus inferat, quibus sacerdotes, aut in pauperum usum, aut in captivorum redemptionem erogatis, suis orationibus pacem populo & salutem impetrant*. Thus the kingdom of Burgundy was the first that established the universal payment of tithes by a positive law. This payment, in the other parts of France, was long after at pleasure, or by particular foundation; but was daily gaining ground, especially after the impoverishment of the church by Charles Martel rendered them more necessary; and his grandson Charlemagne was the first that established them by a positive law, made in a general assembly of the states, through all France; and that as due by a divine right, in the year 778. And as he and his successors were masters also of Germany and Italy, the same law and opinion soon passed into those countries†.

BUT as positive as his law was, in the direction of payment of them to the bishop or priest, it was for a long time not universally obeyed, and where it was obeyed, often shamefully eluded, as appears by the laws of his successors, and many ecclesiastical canons framed for the redressing those mischiefs. For as a portion of the tithes was originally distributed to the poor, under this pretence, it was customary for the superstitious laity, when they granted the tithes, instead of assigning them for the maintenance of the ministering, *i. e.* the secular clergy, to appropriate them to monasteries, which were societies of voluntary poor. These appropriations, or consecrations, as they were called, became very numerous, both from the un-

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† Montesquieu, l'Esprit des loix. liv. 31. chap. 12. Selden of tithes, ch. 7. Father Paul of benefices, ch. 11.

bounded veneration paid to the monks, and from the encouragement such grants received from the see of Rome, which looked upon the monastic orders as its fastest friends, and was bent upon raising them on the ruin of the secular clergy. But as the monks of those times were generally laymen, and incapable of serving the cure, it grew into a practice for them, if any of their own body was fit for the purpose, to get him ordained; or if they had none, to employ a secular priest, to perform the divine offices, under the name of their vicar or deputy, who was to account with them for the profits, and was to receive for his subsistence a stipulated proportion; and thus came in the division of parochial tithes, into *rectorial* and *vicarial*; the former remaining in the *employer*, the latter in the *employed*, who did the duty †.

THE same pretence of appropriating the tithes to the poor gave a handle likewise to many, when they found it necessary to pay tithes, to grant them to laymen in fee, under the like conditions and services as other fiefs; and many likewise were the unworthy churchmen, who turned the incomes of their church into provisions for their families, by granting them in fief. Thus, in process of time, were the ministering clergy, and the real poor, for whose support the tithes were originally granted, in a great measure stripped of them; and they were converted either into lay inheritances, for secular services, or applied to the support of monasteries; and both these abuses began under the specious pretence of charity. The latter, *viz.* the grants to monks, was always favoured by the heads of the church; and the former, in spite of all their censures, prevailed, until, at length, it was found necessary to apply some remedy to both. The evils were too inveterate to be finally removed; but this temper was found out in the council of Lateran, held in 1215, when it was enacted, That all tithes which from time immemorial had been given in fief might so continue, but no more be granted in that manner for the future; and the appropriations to monasteries were confined to three orders of monks who were looked upon as the most learned, and capable of furnishing men fit for the duty ‡.

I SHALL proceed now to say something of the fate of tithes in England. That tithes had been paid in several parts of England during the heptarchy, and established by law in some of its kingdoms, is undeniable; but

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† Father Paul of benefices, ch. 14.

‡ Giannone's hist. of Naples, b. 19. chap. 4. § 2.

the first who ordained them by law, through all England, was Ethelwolf, in his parliament of the year 855; who had been himself, in his elder brother's life, designed for the church; in this imitating Charlemagne, at whose court his father had long resided. This may well be allowed, although those authors that give us the copy of this law differ in the date, both as to the time and place where it was made. But be that as it may, his son Alfred certainly made a law for this purpose, to bind not only his own English, but also the new converted Danes, to whom he assigned seats in his kingdom, and whom he had submitted to the government of Guthrun. Such laws were renewed by almost every one of his successors down to the Norman conquest; an evident proof, that however zealous those princes were for the support of the church, their pious intentions were but ill seconded by their people. The severity of the law of Edgar was remarkable, and of itself sufficient cause of their backwardness; for it made the non-payment of the tenth a forfeiture of eight-tenths. The *præpositus* of the king and bishop, that is, I presume, the sheriff and arch-deacon, were to seize the fruits out of which the tithes had been withheld, and when they were divided into ten parts, one was given to the church that had been defrauded, another to the proprietor, and the remaining eight were divided between the king and the bishop†.

DURING these times appropriations of tithes, to other churches than the parish one, and also to monasteries, were frequent, here as well as on the continent; but, for some time after the conquest, the largesses to the monks, with respect both to lands and tithes, encreased considerably, and were continually encouraged by the popes, the kings, the bishops, and nobility; by the popes for the reason already given; by the bishops and nobility, who were all Normans or foreigners, out of partiality to their countrymen (for such the monks generally were) and out of contempt and hatred to the secular clergy, who were universally English; by the kings, not only for this last mentioned cause, but for another peculiar to themselves. The government of the Saxon kings was remarkably moderate, and their laws and constitutions extremely favourable to the liberties of the people. The first race of Norman kings pretended, indeed, a right to the throne,

† Selden on tithes, chap. 8. Bacon, hist. and polit. disc. on the Laws and Government of England, chap. 59. L. l. Angl. Sax. ap. Wilkins.

throne, and every one of them swore to observe the Saxon laws, with such emendations as had been consented to in parliament by William the First. But the conduct of every one of them shewed how little regard they had to that obligation, and how bent they were on setting themselves free from all restraint, and to destroy all traces of the old Saxon laws. For this purpose it was absolutely necessary to depress the secular clergy; who, in those times of ignorance, were the only lawyers; insomuch, that, in William the Second's reign, it was said, *nullus clericus, nisi causidicus*; and, to render them unfit guardians of those privileges, the kings were resolved to trample upon them. For this end, a new language and new forms of proceeding were introduced into the courts, the secular and ecclesiastical jurisdictions, which had been united, were separated; and the clergy were banished from the temporal courts, and the greatest part of the business which formerly had been transacted in the country courts was transferred to the *curia regis*, under the immediate inspection of his judges†.

THUS were the secular clergy daily reduced in circumstances and importance, while the monasteries flourished on their downfall. However, about the time of Henry the Third (for it is hard precisely to fix when it became an allowed maxim of the English law) all tithes arising in any parish were, of common right, payable to the priest of that parish, unless they had been previously appropriated to some other priest, or monastery, either by a positive appropriation appearing, or by prescription where that was lost, and that no layman could prescribe against the payment of them. I say no layman, for with respect to ecclesiastics, the case was otherwise. It had, indeed, been a controversy in France several centuries before, whether the lands of a church or monastery should pay tithes to the parish minister where they lay; but it was determined by the better opinion that they should. However the bishops of Rome, in complaisance to their friends the Monks, granted to many monasteries an exemption from tithes for their lands. And these are the lands, which we see at this day in the hands of laymen discharged of tithes, by virtue of a statute in the reign of Henry the eighth; before I proceed to which, it will be proper to take notice of what a *modus* is, as they were introduced in those early times.

† Brady, Appendix to his hist. p. 15. Carte, hist. of England, vol. 1. p. 441.

A MODUS, then, is a composition for tithes in kind, within a certain district; whereby the layman is discharged from rendering his tithes, on his paying to the parson, in lieu thereof, what the local custom of that place directs. These compositions were originally for the mutual benefit of the clergy and laity; that one might have a settled certainty what to receive, and the other what to pay; and was, while the equivalent continued to bear any reasonable proportion to the value, an excellent means to prevent yearly disputes between the minister and his flock; but as most of them are fixed at certain rates of money, the change of its value hath, in all these cases, greatly impoverished the parochial clergy, especially as many of them grew up into a prescription, by the negligence of the clergy, without an original composition. These *modus*es have, likewise, not a little hurt the spiritual jurisdiction; for as their courts paid little or no regard to them, as being against the canon law, if the original composition did not appear to have the bishop's authority, by being found in his registry, the temporal courts, wherever one is pleaded, send a prohibition to the ecclesiastical one, and reserve the trial to themselves, by a jury of twelve men, as the legal judges of the custom†.

WHEN Henry the eighth threw off the pope's supremacy, great was his danger both from abroad, and at home, particularly from the monasteries. A resolution therefore was taken for suppressing them, and applying their revenues to more useful purposes. The intention of Cranmer, at least, was to restore the tithes to the parochial clergy, and out of some part of the lands to found new bishopricks, and for other religious and charitable purposes; the remainder to be united to the royal demesnes to enable him to defend his realm without burthening his subjects with subsidies. But little of this kind was done. Five or six bishopricks, with very poor revenues, were erected, and the rest, both of lands and tithes, were distributed to the laity in whose hands they still remain, partly out of present political views, but principally from the extravagance of that king and the indigence of his successors, concurring with the avarice of their courtiers. As to the lands the abbots held discharged of tithes, the parish ministers right to them would, by the common law of England, have revived as soon as they got into lay-hands; as it would have done before, if the abbot had aliened with the consent

† Selden on tithes, chap. 14.

sent of the convent, and this was the case of the lands of the lesser monasteries. But when the greater ones were dissolved by the act of 31st of Henry the eighth, it was expressly provided, that the king and his grantees should enjoy those lands, discharged from tithes, in as ample a manner, as the abbots held them before that time. Thus became a great part of the tithes of the kingdom, which by the common law of England were the legal maintenance of the parochial clergy, lay fees, and inheritances, as they continue at this day†.

TITHES are of three kinds, *prædial*, *personal* or *mixed*. *Prædial*, are the fruits arising immediately from the ground, as all sorts of grain, hay, underwoods, fruits of trees, hops, saffron, hemp, flax, and such like. *Mixed*, which arise from cattle nourished by the ground as their young, colts, calves, lambs, pigs, or their productions, as milk, cheese, butter, &c. Thirdly, *personal*, which arise from the labour and industry of men using any merchandize, or manual occupation, and is the tenth part of their clear gain.

THE two first had their foundation in the law of Moses, the last was introduced and strongly enforced by the canon law, nay so shameless were some of the canonists, as to insist that harlots were obliged to pay the tenth of their infamous gains; but this latter kind has had little effect in England, except by the local customs of some particular places‡.

As to what things are tithable or not by our law, it may not be amiss to lay down some general maxims concerning them.

FIRST then, as to *prædial* tithes: Regularly, they are due only out of things that increase annually, *simul & semel*, and therefore except by special custom, mines, minerals, chalks, stones, slates, turfs, being part of the soil, and not increasing annually, are not tithable; but this rule admits of some exceptions, of which I shall just mention two. Saffron, which increases from three years to three years, is yet tithable; and so is underwood, that is, all trees cut under twenty years growth. The tithes of trees occasioned many contests between the clergy and laity in England, the one exacting it by

† Carte's hist. of England, vol. 3. p. 135, 143, 148, 149. Lord Herbert's life and reign of Henry VIII. p. 186. et seq. ap. Kennet.

‡ Gibson, Cod. Jur. Eccles. Anglican. tit. 35. Hume, vol. 1. p. 51.

by their canons, and the commons in parliament constantly remonstrating against it. At length it was settled by parliament, that none should be exempted but timber above twenty years growth, as being fit for building. But this statute is so constructed, that if the trees be not of the nature of timber, they are tithable, though above that age, as bush, birch, and the like; but these, if for the scarcity of other timber, they are used in building, as beech is in Buckinghamshire, they are there exempted.

As to mixed tithes, the rule is, that things *feræ naturæ* are not tithable. Therefore fish, pheasants, partridges, rabbits, deer, bees, and such like are not; but several of these, if reclaimed, have been adjudged to be so, as bees in a hive, and the same reason holds as to pigeons in a dove house; though the opinion of common lawyers is, that they are not tithable, if spent in the house, and not used for sale.

BUT what shall we say for barren cattle, from whom no yearly profit arises? Shall the parson receive no benefit whatever from them, and shall it lie in the power of the occupier, by employing all his land in feeding nothing but barren cattle, to leave his minister without support? Certain it is, whatever the modern practice and opinion may be, that by the best authorities of the antient lawyers, *agistment* was due to the clergy which was the tenth part of the value of the lands, or the twentieth, which by custom, in most places, was generally paid, if the proprietor depastured the whole year, or less, according to the time and quantity of the cattle, saddle horses, or cattle for the plough, only excepted†.

THUS much may suffice for the history and general rules of tithes, the second species of incorporeal rights, to which I may add, as much of the same nature, and founded on the same reason, what is called *ministers money* out of houses, in cities and towns, where there are no tithes, which the act of parliament, of the 17th and 18th of Charles the second, hath restrained to the twentieth part of the value of houses, as valued by a commission from the Lord Lieutenant and six of the council.

† Wood, Institute of the Laws of England, fol. 161. et seq.

LECTURE X.

The right of Seignory and its consequences—The right of Reversion—Rent seek—Rent charge—The nature of distress, as the remedy for recovering feudal duties. Observations on distresses in general.

HAVING spoken of tithes and advowsons, two kinds of incorporeal benefices that arose in those antient times, I come now to treat of *seignories* and their consequences. A *seignory* is an incorporeal right and interest still remaining in the lord, when he parts with his lands, in benefice to a tenant. Now the rights of a lord, in respect of his *seignory*, may be considered in two ways, either as the services were due to the lord from the *person* of the tenant, or from the *lands*. He hath therefore, in virtue of his *seignory*, a right to all those personal duties which flow impliedly from the oath of fealty; such as to receive warning from his tenants of any injury done, or impending danger to his person, his dignity, or *seignory*, to receive faithful advice from them when called upon, and to have his secrets faithfully kept by them; to be the judge of their controversies, and the leader in war of such of them as hold by military service. For these barbarous people had no idea of dividing power, but always entrusted the civil and military sword in the same hands; whereby they avoided the dangers and disorders that more polished and richer nations have ever been exposed to, namely, of having the civil and legal authority subverted by the military power. And so strict was the bond between lord and tenant, that the latter could in no wise, in point of judgment, decline his lord's jurisdiction, by refusing him as judge on account of partiality. Such a charge was a breach of fealty on the vassal's part, and no such presumption could be admitted by that law, which looked upon the lord as equally bound by the oath of fealty, though not taken by him, as the tenant was †.

By the Roman law, a suspected judge might be refused by the suitors for almost all the same causes, and grounded mostly upon the same reasons, for which

† Madox, *Baronia Angl.*

which jurors, who in our law are *judges of the fact*, may be challenged at this day. But the feudal customs admitted no such suspicions as to the lord, and therefore in the English law, no judge, however clearly interested in the cause, can be challenged. This maxim once established, it was necessary, however, for the sake of justice, that it should admit of some qualification. The *assessors* in Germany, who assisted the lord in judgment, from whom came, in after time, the *pares curiæ*, were this qualification. But as these were not judges in all feudal causes, but in some the lord alone continued sole judge; some remedy was here to be applied, and on the continent and in England, they proceeded differently. On the continent, the king, or superior lord, appointed a *cojudge*, or assessor. In England the suitor, by applying to the king's courts was empowered to remove the cause thither; which hath been one great occasion of these inferior courts of the lords dwindling to nothing†.

As to the right the lord had in the land by virtue of his feignory, the principal, and upon which his other rights out of the land depended, was his *reversion*. A reversion is that right of propriety remaining in the lord, during the continuance of the particular estate of possession of the tenant; whereby he is entitled to the service during the duration of the term, and to the possession itself, when it is either expired, or forfeited. Hence it appears that the fealty and services of the tenant are incident to the lord's reversion. Out of these reversions may be carved another incorporeal estate, called a *remainder*, which is a particular estate dependant upon, and consequent to a prior particular estate; as if lands be granted to A. for five years, and afterwards to B. for life. In this case A. hath a lease for years, B. a remainder for life, and the reversion remains in the grantor. In our law, remainders, and the particular precedent estate on which they depend are considered as making but one estate; and so, in truth, they are with respect to the reversioner, though not to each other. Therefore they must both pass out of the grantor at the same time, though it is not absolutely necessary that the remainder should vest in the grantee at the creation of the precedent particular estate; for a remainder may be good which depends on a contingency, as if a remainder, after a lease for life or years to A, is limited to the eldest son of J. S. This is a good remainder, but a contingent one, depending

† 4. Instit. 268. Scroggs of Courts Baron, p. 56.

depending on the birth of J. S's son during the continuance of the term of A; for the remainder being but one estate with the precedent particular one, and only a continuation of it, must commence instantly when it determines. Or, if after a lease to A, a remainder is limited to the heirs of J. S. this is a good contingent remainder, depending on the event of J. S. dying during the particular estate. For it is a maxim of the English law, *Nemo est hæres viventis*.

To return to reversions, I mentioned fealty and services as incidents of a reversion; but we must distinguish that fealty is an inseparable one, which the services are not; for the tenure being from the reversioner, and fealty necessarily incident to every tenure, it is impossible they should be separated. A grant, therefore, of fealty, without the reversion, is void; and the grant of the reversion carries the fealty with it. But the case is otherwise as to the services; for the services may be granted without the reversion, and although the reversion be granted, the services, by special words, may be excepted†.

It will be now proper to speak of the remedy the reversioner hath for the recovery of his services, if they are not paid. In the antient times the tenant was, at all the due times, at his peril obliged to perform his service; for as each the smallest failure was a breach of his fealty, his tenancy was thereby absolutely forfeited, and this long continued to be the case in military tenures. But as the defence of the realm was not concerned in the socage holdings, but only the immediate interest of the lord, it was thought too hard, that every, perhaps involuntary omission, should induce an absolute forfeiture; when the lord, where his dues were certain, might receive an adequate recompence. Custom, then, introduced the method of *distress*, in imitation of the Roman law, as the proper method to recover an equivalent for the damages he sustained by the non-performance of the duties. And afterwards, when the personal service of the military tenants came to be commuted into a sum of money called *escuage*, distress came to be the regular method of recovering that and the other fruits of the military tenure; the damage the lord sustained being now capable of a reduction to a certainty‡.

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† Coke on Littleton, lib. 2. chap. 12. § 215.

‡ Madox, Antiquities of the Excheq. vol. 1. p. 652.

THE introduction of distress on socage tenants was thus : When the absolute forfeiture was thought too severe, the first step was, that the lord should enter, and hold the lands till his tenant had satisfied him as to his damages ; but as this seizure frequently disabled the tenant from making that satisfaction, especially if he had no other lands, this, after some time, was thought still too rigorous, and in its stead was substituted the seizure of the cattle, and other moveables found on the land, and the detention of them as a pledge, until the damages were answered ; which is what we call *distraining*. This was a sufficient security to the lord, as it rarely happened but that there was sufficient found to answer his demand for one failure ; and the tenant was not (as not being deprived of his possession) reduced to an incapacity of paying his rent of services, and thereby recovering his pledges. Hence all feudal rents, or, as our law calls them, *rent services*, (being the service the tenant pays to the lord, in consideration of the land he holds from him) are distrainable †.

But there was another species of rents in our law not distrainable ; which, therefore was called *redditus siccus*, or *rent seck*. This was not a feudal service, not being paid from a tenant to his lord, and was thus : When a man, keeping still his land in himself, grants a rent thereout to a stranger, the grantor is justly bound by his grantee ; but the grantee, not being his lord, cannot have this remedy. For the remedy of distress being substituted in the place of the lord's right of entry, could not be extended to a stranger, who never had that right. And this was originally the only kind of rent seck ; but the statute called *quia emptores terrarum*, introduced another species of rents not distrainable, by converting rent services into rents seck. The liberty of alienation without the consent of the lords having been allowed before that statute, it became customary for a tenant who sold his land, and parted with his whole estate in it, to reserve the tenure of the *vendee*, not to his superior lord and his heirs, but to himself and his heirs ; whereby he retained many advantages to himself, by continuing the vendee's lord, such as the right of escheat, if the tenant died without heirs, and the benefit of the wardship and marriage, if it was held by knight's service. Now a rent reserved upon such a sale to the vender, was, as he continued the vendee's lord, a rent service, and consequently distrainable ‡.

BUT

† Coke on Littleton, lib. 2. chap. 12.

‡ Ibid.

BUT this practice, though highly useful to the sellers, was of considerable detriment, not only to their lords, who thereby frequently lost the fruits of their tenures, but indeed to the whole military policy of the kingdom. It was enacted, therefore, in the eighteenth of Edward the First, by the statute above mentioned, that whenever a man aliened his whole estate, the alienee should not hold from him, and be his tenant, but from the superior lord, and be the lord's tenant directly; and that by the same services, by which the alienor had holden. The alienor, then, by this statute, ceasing to be lord, and his right of reversion clearly gone, if he reserves a rent on such alienation, he cannot distrain for it, and it is a rent *seck*.

THESE rents *seck*, therefore, were of two kinds, one arising by grant, which was the most ancient, the other by reservation, when a man aliened his whole estate. For if the whole estate was not gone, but a reversion remained in him, a rent reserved was still, on account of that reversion, a rent service; as if A. gave lands to B. and the heirs of his body, reserving rent. As this estate tail, although it might continue for ever, yet was capable of determination by the failure of that issue, such rent was distrainable, for that reason, and also because, by the statute which gave force to such estates tail, the reversion was saved to the donor. But if he had made a lease of life or years, or a gift in tail, and had, at the same time, conveyed over the remainder in fee, so that his reversion was gone, a rent reserved on such a grant was *seck*.

THE inconvenience attending these rents *seck*, in their not being distrainable, introduced another species of rents called *rent charges*. These are rents *seck*, armed with a power of distress by the special agreement of the parties; and are of two kinds, as the former are created either by *grant*, or *reservation*. Those by grant, which were the only species of rent charges before the statute, were thus; as if I grant out of my lands, keeping them still in myself, a rent for years, life, fee tail, or fee simple, and give my grantee a power to enter and distrain for the rent. It will be by reservation; if I reserve to myself a rent upon a conveyance in fee simple, or upon a gift in tail with a remainder over in fee, or upon a lease for life or years, with a remainder over in fee, and it is covenanted that I shall have a right to enter and distrain for the rent. The power of distress, therefore, in rent charges

is good only by the exprefs provision of the parties, not by the force of the general law†.

ANTIENLY it was a doubt whether a rent charge could be referved upon a *deed poll*; to underftand which, it will be neceffary to explain the difference between a *deed poll* and an *indenture*. A deed poll is a grant from one man to another, and is all and every part of it the act and words of the grantor only; and therefore the deed belongs to the grantee, and there is no counterpart in the hands of the grantor; becaufe the grantee binds himfelf to nothing towards him. Whereas, in an indenture, every clause is the act and words of both. They are mutually bound to each other, and therefore there is a counterpart in the hands of each party. Now if A. by deed poll, granted lands in fee to B. referving rent, with a clause of diftreff, it was doubted whether this clause was not void, and the rent a rent feck; becaufe as the lands by A's grant was in B. it was apprehended they could not be charged with it without an exprefs covenant from him; as in the deed poll he was a party merely paffive. But it is now held, and that very equitably, that fuch a refervation can raife a good rent-charge; for his acceptance of the deed upon the delivery is an act fufficient to fhew his affent to take it on the terms therein contained; and nothing can be more reasonable than that whofoever takes a benefit fhall take it under fuch conditions, and no other than fuch as the donor intended.

THUS have I endeavoured to explain the nature of the three feveral kinds of rents in our law, of which only rent fervice is properly feudal; but upon account of the affinity of their nature, I thought proper to join them here. It will be proper now to fay fomething concerning the nature of *distreffs*, as it was the remedy for recovering the feudal duties in thefe kingdoms.

DISTRESSES were not only taken for rents, and other fervices referved, but alfo to oblige perfons to appear in courts of juftice, or to raife fines, and amerciaments inflicted on them. This likewise arofe from the feudal law, as by that the doing fuit and fervice at the lord's court was one of the duties attendant on fealty.

BUT there is another kind of diftreffs allowed by our law, arifing neither from the feudal contract, nor the exprefs ftipulation of the parties, but
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† Coke, ut *supra*.

from the *delictum*, or negligence of a stranger. It is called a *distress for damage feasant*, and is a seizure of the cattle, or any other moveable of a stranger, trespassing upon or damaging my ground. The law in this case will not put me to my action against the proprietor, whom perhaps I may never discover; but has provided a *festinum remedium* for me, by way of distress; and this distress is more privileged than others, for it may be taken in the night-time, which other distresses cannot; because, otherwise, the cattle might escape, and the goods be removed, and so the party injured remain without remedy.

MANY and grievous were the extortions and oppressions of the antient English lords in their taking distresses, during the troublesome reign of Henry the Third, for the remedying which many wise regulations were made by the statute of Marlebridge and others. For they not only distrained in a most unreasonable manner for the smallest duties, but distrained where nothing was due; and frequently even out of their fees; and to deprive the parties injured of legal remedy, drove them into another county, or inclosed them in a castle, or would not suffer their bailiffs to permit a replevin†.

SINCE I am on this head of distresses, it will be proper to make a few observations, *what* may be legally distrained, *when*, and *where*, and *how* a distress is to be demeaned, and what remedy the person wrongfully distrained hath to recover his property.

FIRST then, nothing can be distrained but moveables, and such as may be restored in the same plight. For the distress is in the nature of a pledge, to be restored on due satisfaction made; therefore nothing fixed to the freehold is distrainable, as doors, windows, furnaces, &c. for these being affixed thereto, are part of the freehold, and cannot be separated thence without damage. Therefore, a smith's anvil, though not actually fixed, or a millstone removed in order to be picked, are not subject to distress; for the one is, in law, still part of the shop, as the other is of the mill. Hence, likewise, money is not distrainable, unless it be in a bag; because, otherwise, it cannot be known, so as to return it in the same plight. For the

† Madox, Antiq. of the Excheq. chap. 13. The Statutes at Marlebridge, ap. Ruff. head, vol. 1. p. 30.—

same reason, by the old law, corn in sheaves, or in stacks, or in a barn, or hay in cocks, or in a loft, could not, for fear of damage in removing. That however hath been since altered by statute, but corn or hay on a cart could be distrained by the old law; for they being, in such a case, found in a situation fit for removal, might be transported from place to place without any probable danger of damage, or diminution.

SECONDLY, The instruments of a man's livelihood, as the tools of a tradesman, the books of a scholar, the plough-cattle of a ploughman, &c. cannot be distrained where any other distress is to be found; and this for the particular safety and benefit of individuals. But this holds not in the case of *damage feasant*; for there the identical thing that did the trespass, and that only, must answer for it.

THIRDLY, Things sent to public places of trade are privileged, for the public benefit of the realm, as cattle in a market, corn sent to a mill, cloth in a taylor's shop, yarn in a weaver's house. For it would put a total stop to commerce if these were answerable for the rents of such places.

FOURTHLY, What is in the custody of law is not distrainable, for it would be an absurdity that a man should have a right by law, to take things out of the custody of the law itself, such as goods already distrained, or goods taken in execution, or seized by process at the suit of the king.

FIFTHLY, Things in manual possession of another, are, for the time, privileged, as an ax in a man's hand, or the horse I ride on. But for *damage feasant*, as I said before, every thing is distrainable; for the thing itself which did the damage, is the pledge of the satisfaction, and the only one.

NEXT let us see *how* and *where* they may be taken. The distress, then, should not be excessive, as an ox should not be taken for twelve pence, where other sufficient distress might be had, or two sheep where one was sufficient; but for *damage feasant*, though ever so little, the whole may be taken; and likewise for homage, fealty, or the wages of members in parliament. As the interest of the whole community is concerned in these, no distress

distress can be excessive. No distress can be taken in the king's highway, for it is privileged for the public use of the nation. Neither can any distress be taken by night, unless for damage feasant; for as no tender of rent, or other duty, can be made, or acceptance enforced but in the day-time, perhaps the tenant may, in such case, be provided, and ready to tender his duties the succeeding morning, and thereby save his chattels. Lastly, by the common law, no man could distrain out of his fee, unless when coming to distrain he had the view of them, and they were driven off to prevent him. But this hath been altered by statute, and now a landlord may follow his tenant's cattle, if conveyed by his lessee off the land, and distrain them within twenty days.

As to the *manner* of demeaning or managing the distress, it is the duty of the distrainor to carry them to a pound, that they may be in the custody of the law. *Pounds* are of two kinds, *overt*, or *covert*; the one for living cattle, the other for other goods that might take damage by the weather. The reason why living cattle should regularly be put into a pound overt, is, that, as they are but a pledge, from which, in itself, the taker is to receive no benefit; and as the proprietor, therefore, must be at the sole expence of feeding them, he should have the freest access to them for that purpose; and, in such case, if they perish, the loss is his; but if they be put into a covert pound, there, because the owner cannot have access, the taker is to feed them, and answer for them at his peril.

In antient times, the lords used to drive the distresses into foreign countries, whereby the tenants knew not where to resort to feed their beasts. This was forbidden by Marlebridge, cap. 4. However, that act received this construction, that if a manor lay in two counties, and its pound in one of them, the lord might distrain in the other county, and impound them in his manor pound; because the tenant, by attending the manor court, was presumed to know every thing transacted in the manor. But now, by later acts, no distress of cattle shall be impounded out of the hundred, or barony where taken, except in a pound overt, in the same county, within three miles of the place; nor shall distresses be divided, and impounded in several places. Dead chattels must be impounded likewise within three miles,
and

and that in a pound covert, otherwise the taker is answerable for them, if damaged or stolen.

As to the *remedy* for taking an unjust distress, the tenant might, if there was nothing due, rescue them before they were put in pound, and justify it; but when once impounded, they were in the custody of the law, and must be delivered by law. Or if there was any thing due, he might, before they were impounded, make a tender of satisfaction; which, though the caption was just, rendered the detention unlawful; and therefore if the beasts, after such tender, were put in pound, and died there, the taker was answerable.

WHEN the goods were once impounded, the remedy was by *replevin*, which is a judicial writ out of Chancery, directed to the sheriff, who is judge in this case, complaining of the unjust taking and detention, and commanding the sheriff to deliver them back to the owner, upon security given to make out the injustice of the taking or detention, or else to return the goods and chattels.

BUT this method of replevin, by writ out of Chancery, was very inconvenient to the remote parts of the kingdom; as the owner might be put to extraordinary expence and trouble, in maintaining his cattle for a long time. Hence it was provided, by the statute of Marlebridge, cap. 21. *Quod si Averia alicujus capiantur, & injuste detineantur, vicecomes post querimoniam sibi factam, ea sine impedimento vel contradictione ejus qui dicta Averia cepit, deliberare possit* †.

THIS empowered the sheriff to make replevins without writ, upon the plaint of the plaintiff in replevin; and this he could do out of his county court, because, as that was held only from month to month, were it otherwise, the delay might be as great as in the case of a writ of replevin; but then the sheriff, in order to lay the foundation of the suit, must enter the plaint the next county court, that it may appear on the rolls thereof.

THE sheriff's duty then was, in the first place, to take sufficient security *ad prosequendum*, that is, that the plaintiff should make out, in due course of

† Ruffhead, vol. 1. p. 37.

of law, the justice of his writ or plaint, that is, that the cattle or goods were either taken, or detained unjustly. He was also to take security *de retorno habendo*, that is, in case he failed, that he would return the same distress, that it might be delivered to the taker; and this is by the statute of West. 2.; and he generally, likewise, took security to indemnify himself from any action that might be brought against him. And then it was his duty immediately to deliver the distress to the plaintiff in replevin.

THEN it lies on the taker or defendant in replevin to *avow*, that is, to set forth the reasons of his caption, to which the plaintiff replies; and so the justice of the cause comes into question, to be legally determined. Thus much is sufficient, at the present, to shew the remedy the lord hath for his services, by virtue of his feignory, and how his tenant is to defend himself if unjustly distressed †.

I MIGHT here treat of another fruit of the lord's feignory, which is the *right of escheat*, or the lands falling back to the lord, either for the *delictum* of the tenant, or the failure of blood; but as, to understand this last properly, we must know who are inheritable, it will be more proper to defer it till after we have treated of *inheritances*.

† Glanvil, lib. 9. c. 8. lib. 10. c. 3. lib. 11. c. 4.

LECTURE XI.

The manner in which estates for life came to be enlarged into descendible estates—The nature of Reliefs—Feudal oppressions—The admission of allodial lands into the feudal policy—The extension of the feudal system in France.

THE feudal lands having been changed by degrees from tenancies for years into permanent grants for life, partly by the necessities, and partly by the favour of the lords, the matter did not stop here; but, to the advantage of the vassals, their rights were continually gaining ground, and insensibly extending themselves, to a durable continuance in the same family. To this, undoubtedly, the number of allodial estates, which were estates of inheritance in the hands of the Romans, greatly contributed. For it is not to be imagined that it could be an agreeable spectacle to the conquerors, when once they were settled, and secured in the possession of the country, to behold their posterity in a more precarious situation, with regard to property, than the vanquished were. It is true, as by their constitution the lord was obliged to provide every gentleman, that is, every one of their nation, unless he proved unworthy, with a benefice, there was no danger of their issue not being supplied, in some degree or other. But this did not satisfy them †.

THEIR roving manner of life being antiquated, and the practice of removing them from place to place every year being superseded by gifts for life, the possessors, by habitude, became fond of their dwellings, and no longer contented with bare necessities, studied to render their situation commodious and agreeable. They built houses of strength and convenience, and by their socage, tenants and villains planted and improved their lands. And now it began to be thought severe, that the benefit of their improvements, and the fruit of their and their dependants toil and labour, should go to strangers, or even to the lord himself. For before this time it

† Houard, *Anciennes loix des François conservees dans les coutumes Angloises*, tom. I. p. 32. et seq. Craig, lib. I. dieg. 4.

it had began, and was now grown into a common practice, for the lords, when they gave an estate for life, not to content themselves merely with future service, but to exact, at the time of their investiture, an *honorary fine* from the tenant; and this, being but moderate, was generally complied with, in order to gain a permanent estate. The interest of the state, which was concerned in the improvement of particulars, required also a preference of the descendants of those that made them. It is no wonder, therefore, that it grew to be a maxim, and universal opinion among these people, that the not continuing the son in the possession of his deceased father, though it was in the lord's power to remove him, was a great hardship, and an unworthy act in the lord †.

WITH these general sentiments, the lords, for their own interest, were obliged to comply, and especially the kings; who, by the frequent divisions of the monarchy in France, had competitors to guard against; and were, therefore, enforced to attach their vassals to them in the strongest manner, by complying with their inclinations. The sons, therefore, or one of them, generally succeeded; not in virtue of any inherent right, but by a new gift, through the favour of the lord. For, upon the death of his vassal, the estate being expired, the lord took possession, and, upon receiving a fine, made a new grant, by investiture, as of a new estate, to such an one of the sons as he chose; or he divided it among them at his pleasure. These fines for continuing the fiefs in the same family were called *relevia* or *reliefs*, from the Latin word *relevare*, which signified a second lightening, or removing the hand of the lord, who had seized the benefice upon its vacancy, by the death of the former possessor. Hence the son had no right to continue his father's possession. He was obliged to petition for a new investiture, and to tender his relief, and himself ready to take the oath of fealty. These reliefs were originally paid in arms, being the most valuable property these military people had, and afterwards were converted into money. The *quantum* was originally at the lord's will; but his own interest, from the motives already hinted, commonly prevented him from being exorbitant. This preference to a succession being at first a matter of favour, not of right, some vassals, by degrees, obtained of their lord, in their investitures, an ab-

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† Bracton, lib. 2. c. 36. Hume, append. 2. Du Cange, voc. relevium. Spelman, voc. relevamen. Reliq. Spel. p. 32, 33.

solute right of succession to their sons; which bound the lord and his heir; and that in these two different manners. It was either by a grant to the vassal, and one or more of his sons by name; and then those omitted were excluded; or *to him and his sons* generally; and then, by the feudal law abroad, they were all admitted to enjoy in equal portions, in imitation of the Roman law, which admits all the children in that manner.

BUT the words of the grant were not extended, by a favourable construction, to take in grandsons by the name of sons, for the following reason. When a grant was made to a man and one or more of his sons by name, the sons were originally, at the time of the investiture, capable, or supposed capable, by the lord's admission, of doing the services of the feud; and their ability and merit was in the contemplation of the grantor, and part of the consideration of the grant; and where it was given to a man and his sons generally, the law presumed the same thing, the same capacity in them, the same intention in the grantor. But in the case of grandfather and grandson, the law could not presume so, it being contrary to the ordinary course of nature, that both should, at the time of investiture, be capable of doing the services in person; and therefore the grandsons, unless specially provided for, were excluded †.

THUS a right of succession for one step was gained by the express provision of the parties, in particular cases. But as the lord, where he continued the succession out of favour, entered into the lands, and parted not with them without payment of his relief by the son, it was reasonable in this case, where he positively bound himself, that these advantages should be reserved to him. Therefore the heir could not enter, but was obliged to petition his lord *humiliter* and *devotè*, and to offer his fealty and relief; and the interest of the lord and of the state requiring the place of the deceased vassal to be speedily filled up, a year's and a day's time was allowed for this application; within which space, if the heir did not apply, unless prevented by inevitable necessity, he forfeited his right of succession, and the lord was at liberty to dispose of it to a stranger.

RELIEFS,

† Fleta, lib. 3. c. 77. Feud. lib. 1. tit. 1. Dalrymple on feudal property, ch. 5. Madox, antiq. of the Exchequer, ch. 10. § 4.

RELIEFS, however, being, in their original creation, arbitrary, it should seem to be in the power of the lord, where the quantity was not specified in the tenor of the investiture, to defeat his own grant, by demanding, under that name, more than the value of the land, or otherwise grievously to distress his tenant. This, in England particularly, occasioned many struggles. It appears from the laws of William the Conqueror, that, in those times, the reliefs were fixed according to the different ranks of the persons, and paid in horses and armour, in imitation of heriots in the Saxon times; but his avaricious and tyrannical son William Rufus laid claim to, and exacted arbitrary reliefs, to the great discontent of all, and to the impoverishment of many of his subjects †. This was redressed in Henry the First's charter, where the first chapter says, *Si quis baronum, comitum, sive aliorum qui de me tenent mortuus fuerit, heres suus non redimet terram suam sicut faciebat tempore fratris mei, sed legitima, & certa relevatione relevabit eam, similiter & homines baronum meorum, legitima, & certa relevatione relevabunt terras suas de dominis suis* ‡. Henry the First, however, was a man little inclined to keep any engagements with his people that he could free himself from; and therefore reliefs went on in an arbitrary way, for the most part, under him, though not in so oppressive and extorting a manner as his brother William had used. For in his grandson Henry the Second's reign, in whose time the feudal payments became generally converted into money, we find, from Glanville, that the relief of a knight's fee, indeed, was reduced to a certainty, but that of a noble fee was not. *Dicitur autem rationabile relevium alicujus, juxta consuetudinem regni, de feodo unius militis, centum solidos;—de baroniis vero nihil certum statutum est, quia juxta voluntatem & misericordiam domini regis solent baroniæ capitales de releviis suis domino regi satisfacere* ||.

It seems a little odd, that the lower military people had got such an advantage above the great and powerful lords; but this may be accounted for from the number of the knights, who made the strength of the kingdom, and were not to be disobliged; and also from the precarious situation many of the great lords were in, who had been attached to the cause of Stephen. However, the wisdom and moderation of this great prince was such, that we find no complaints on this head, during his reign, or that of his son Richard; but

† Wright on tenures, p. 95. 96.

‡ L L. Hen. 1. c. 1.

|| Lib. 9. c. 4.

but when John ascended the throne, a prince who hated, and was hated by his nobles, the old oppressions were renewed, and aggravated to such a degree, that the remedying thereof is the first article of temporal concern in Magna Charta †.

THERE it is provided, *Si quis comitum, vel baronum nostrorum, sive aliorum tenentium de nobis in capite per servitium militare, mortuus fuerit, & cum decesserit, heres ejus plenæ ætatis fuerit & relevium nobis debeat, habeat hereditamentum suum per antiquum relevium; scilicet, heres, vel heredes comitis de comitatu integro per centum libras, heres vel heredes baronis de baronia integra per centum marcas; heres vel heredes militis de feodo militis integra per centum solidos ad plus: Et qui minus habuerit minus det, secundum antiquam consuetudinem feodorum ‡.* And now were all reliefs reduced to a certain sum of money, namely, the fourth part of what was then reckoned the value of the inheritance; for a knight's fee was then reckoned at twenty pounds, a barony at four hundred marks, and an earldom at four hundred pounds per annum. And by the gradual sinking of the value of money, and the rising of lands, these payments continuing the same, came in a few centuries to be not the twentieth part of the value. We see by the words *per antiquum relevium, & secundum antiquam consuetudinem feodorum*, how careful the lords were to have this certainty of relief acknowledged as their antient right, and not to accept it as a concession from the crown. When the military lords began, in imitation of the estates they themselves had, to grant inheritances to their socage tenants, they likewise exacted, in the nature of a relief, from every new possessor a year's value; or, in other words, the rent of the first year was doubled. For a year's value was what was, in France, at the beginning, paid for military tenures, by the name of *rachat*, or *repurchase*, answering to our relief, until at length they were reduced to a certainty in money; and, consequently, from the same causes as in England, though remaining nominally the same, they sunk to be very inconsiderable ||.

ESTATES of succession, as I observed, arose first from private grants, and that for one generation only; but they were continually extending to further lengths, and encreasing in number; insomuch that, fiefs falling vacant much seldomer than before, the king had it not in his power to gratify

† Madox, antiq. of the Exchequer, ch. x.

‡ Ruffhead, vol. i. p. 2.

|| Bracton, lib. 2. fol. 86.

fy his deferving foldiers fo frequently as he fhould, and the crown was confequently enfeebled. This then ftaled the notion of fuch grants being good only during the life of the king or lord who made them, and not binding on his fucceffors. Upon this plan, Brunechild, in her regency, during the minority of her infant fon, attempted to revoke them, and actually did revoke feveral; which at length raifed that flame, and caufed that revolution, in which her fon and herfelf miferably perifhed. What fhews the violent indignation her venturing on this ftep occafioned, was the horrid manner of her death, that of being torn afunder by four wild horfes. Clothair the Second, who fucceeded, was wife enough by law to confirm thefe eftates; and then, namely about the year 613, the former doubt was removed, and all thefe eftates of inheritance confirmed to continue againft the fucceffor, according to the terms of the original inveftiture. New grants were continually made, and for more generations than had been formerly praftifed. But yet this rule of defcent was not general; but all grants, unlefs heirs were fpecially named, were but for life; as it is in our law, in which a *feofment to a man for ever*, is but an eftate for life for want of words of inheritance †.

WHAT greatly contributed to the extending thefe grants to indefinite generations, was the inclination that now feized the Romans and Gauls who held allodial lands to be admitted into the feudal policy, by becoming vaffals to the king. They had long lain under very humiliating diftinctions: They were no members of the ftate. The lofs of their lives, and other injuries, were compensated only by half the fatisfaction to a Frank. For neglect, or contumacy, when called into the king's courts, they were reputed guilty, and forfeited their eftates; whereas a Frank was only imprifoned to oblige him to anfwer. When accused of the lighteft crimes, they were put to the ordeal; whereas the Franks were only fubjected thereto in cafe of murder. And many other were the diftinctions between the allodial and feudal tenants. No wonder then the former were very defirous of enrolling themfelves among the conquerors, which when they had at length obtained, their liberty was effected, by their giving their allodial lands, or a part of them, to the king, and receiving them back, fubject to the feudal rules. Now were they immediate vaffals of the king, and, as fuch, became Franks
to

† Montesquieu, l'Efprit de Loix, liv. 31. chap. 1.

to all intents and purposes. But these people were not so foolish, nor could it be expected from them, to part with absolute inheritances, and take back only an estate for life. They insisted upon grants for a perpetuity, at least for as long as the issue male of the person resigning lasted. When once these donations were become common, we may be assured the Franks were very ready to follow the example, and to take all advantages either of the favour, or the weakness of their kings; and to such a number did these inheritances increase, that, about the year 730, the kingdom was near being lost to the Saracens, for want of a sufficient number of beneficiary or life-estates, to encourage the soldiery †.

At the time the kings of France were merely nominal, and the whole administration in the hands of the *maires du palais*, of whom the second, who had obtained this unlimited authority, Charles Martel, was so happy as to save the kingdom from those African invaders in a battle near Tours, wherein they were routed with a slaughter almost incredible. It remained to reward the victorious soldiers, who were at least as much animated to their exploits by his previous promises, as by their affection to the antient constitution of the state, which was now in truth destroyed, the kings of the royal race being mere phantoms, whose names he and his father had made use of at their pleasure. But this family had not acquired sufficient weight and authority, to act as masters. The fund of lands, out of which benefices had been formerly given, was almost exhausted, and the major part of the lands that were not still allodial, was alienated either in perpetuity to the church, as atonements for the vices of the former kings, or what was near a perpetuity to the lords, for many descents. These last he could not despoil. They were too firmly established by custom and law; and he and all his predecessors had paved their way to greatness, by supporting these hereditary grants at the expence of the crown. Necessity therefore obliged him to make free with the lands of the church; for which, in their visions, they lodged him in a chamber, the very lowest in hell. Of these lands the greatest part he converted into benefices of the antient kind, for life only; and by means of the number of those new ones, added to the old ones, that were in the same state, some kind of a balance was formed; which for a time supported the government, and checked the growth of inheritances.

But

† St. Amand on the legislative power of England, p. 27. Montesquieu, *l'Esprit des loix*, liv. 31. ch. 8. Dr Robertson's *Charles V.* vol. I. p. 222.

But it is remarkable, that, of those church lands, several he gave as allodial ones. I will not pretend to say, that, in this distinction, he considered the antient nature of the lands of the church, some of which came from feudal, others from allodial proprietors. It seems rather probable, as the allodial estates were greatly decreased, by being turned into fiefs of inheritance, he was inclinable to form a kind of equality between the feudal tenants, the beneficiaries, and the allodians; that, by managing them, he might advance his family to the title, as well as power of royalty; which we find was soon afterwards accomplished by his son Pepin †.

THE policy of Pepin and his son Charlemagne corresponded with Charles Martel's views. The former allowed the continuance of inheritances according to the original provision in the creation, but were much fonder of the beneficiary estates, and Charlemagne made several laws to prevent his beneficiaries from converting by any art their interests into inheritances. In his time, a great majority of estates were benefices; but this I presume is not to be understood of France particularly, where, from the detail before mentioned, it could scarce be, but of his whole empire. For in his acquisitions, and especially in Germany, where such a practice was agreeable to the antient customs of the natives, such a regulation was conformable to the sound policy of his father and grandfather; by which they endeavoured to restore the splendour of the old French monarchy, I mean with exception to the large gifts he gave to the church on the borders of the infidels, in atonement for his grandfather's sacrilege, and in hopes of converting those barbarians, and thereby civilizing them, and making them good subjects.

BUT the successors of Charlemagne had neither the power nor the understanding of their ancestors. No wonder then, that, under them, the general inclination of the subjects to change their benefices into fiefs gained ground. The division of the empire, and frequent wars between the brothers, weakened the royal authority, and strengthened their vassals; who, at the times of their kings distress, were rather to be entreated than commanded. In the time, therefore, of his grandsons, we find laws, that, con-

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forming

† Mably, observations sur l'histoire de la France, tom. I. l. I. ch. 5. and 6. Montesquieu, l'Esprit des loix, liv. 31. ch. 9.

forming to the inclination of the vassals, did in time put an end to beneficiary estates, holden from the king; opened the gate to *subinfeudations*, and all its extensive consequences; and raised a new kind of polity never before seen in the world, the *feudal* one, such as it reigned about the year 1050 on the continent, and was introduced into England by William the Conqueror †.

I SPEAK of the times of Charles the Bald, who reigned about 860. One of his laws gave leave, and an unlimited one, to the allodians, to submit themselves and their estates, in the nature of fiefs, to others besides the kings. Nothing could contribute more to the weakening of the royal power, and the throwing of all the weight into the baron's scale. Before they could be made Franks, only by becoming the immediate vassals of the king. This was equally for the public benefit of the state, the king, and the allodians. But when once the barrier was thrown down, in those times of confusion, the allodians were glad to gain the protection of the neighbouring lords, and, under colour thereof, detached themselves from their former subjection to the counts, who were the king's officers over them.

ANOTHER law, of equal consequence, was to entitle the fee of a beneficiary, who had only an estate for life, without any express agreement for a longer continuance, to go to the son. This was extorted by the circumstances of the times, and perhaps then was thought of little consequence, as it only continued them for one generation. But the temper and general inclination of the people were not to be controuled. Those grants that had been so long as two generations in a family, it was sometimes dangerous, always invidious not to continue; and thus the successors often obtained permanent estates, when nothing less was intended at the beginning. And this was easily obtained, as the use of letters was not common among these people, and their charters were, by frequent rebellions, liable to be destroyed.

THE last law I shall mention, is that declaring, that the sons of counts, who were the king's officers over the *allodianée*, and were originally for
years,

† Spelman on feuds and tenures. Mably, observations sur l'histoire de France, tom. 1. l. 2. ch. 3. 4, 5, 6. Montesquieu, l'Esprit des loix, liv. 31. ch. 28, 29, 30, 31. Houard, anciennes loix des François, liv. 1. ch. 1. Basnage, coutume de Normandie, tom. 1. p. 146.

years, after for life, should succeed to their father. This put the finishing stroke to the beneficiary estates. For though this, in appearance, was, as the former, but for one life, and conditionally; yet, from the prevailing principles, it was impossible they should not grow up into inheritances. And as all inheritances were growing feudal ones, and upon those conditions, and no others given, these counties become fiefs. The demesnes of the crown within them became the demesnes of the count, and all the allodiaries were now become his sub-vassals †.

WE are come to the dawn of a strictly feudal monarchy; and, to shew the gradation, I have, in this lecture, taken in a great compass of time. But before I proceed further downwards, it will be proper to return a little back as to the order of time, and to speak of the consequences that attended the introduction of estates of inheritance. Of one of these, *reliefs*, I have already spoken in this lecture; but there are many others that must be taken notice of.

† See the authorities quoted above, and Selden's titles of honour, part 2. chap. 5.

LECTURE XII.

Consequences attending the introduction of estates of inheritance—The incident of homage—Differences in England and the Continent, with regard to the ceremonies of homage and fealty—The fine of alienation—Attornment—Warranties—Wardship in chivalry.

HAVING already, in my last lecture, taken notice of *relief*, which sprung up immediately with estates of inheritance, and was their immediate consequence, it is proper now to proceed to the other fruits of this tenure, which grew up not so soon, but in after times: and the first to be considered, as undoubtedly the next to relief, if not coeval with it, is *homage*; which, Littleton says, is the most honourable service (that is with respect to the lord, and the most humble service, that is with respect to the tenant, that a freeholder can do to his lord) as upon the introduction of estates for life, the ceremony of fealty was introduced, so was it thought reasonable, when a further step was taken, that of continuing them to heirs, that a new ceremony should be invented, distinct from the former; which being performed publicly, in the presence of the *pares curiæ*, should, in those illiterate ages, create a notoriety, that the tenant had a more durable estate than a freehold. The manner of performing homage is thus distinctly described by Littleton. When the tenant shall make homage to his lord, he shall be ungirt, (that is, unarmed) and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say, *Thus I become your man* (from which word *homo*, *homagium*, and *hominium* are derived) *from this day forward, of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear your faith, for the tenements that I claim to hold of you, saving the faith that I owe to our sovereign lord the king*; and then the lord so sitting shall kiss him. These are the words of Littleton, and they are just in the case he puts of a tenant doing homage to an inferior lord, and who had no prior lord; but if he had a prior lord, or the homage was to be done to the king, there was a difference in the form; for if the tenant had a former

former lord, he also was to be excepted, that the new lord might have notice of the tenant's prior obligation, and that it was not in his power to do absolute personal services at all times to him. And if the homage was done to the king, who acknowledged no superior, then the exception was entirely omitted; but if to a subject, it was so absolutely necessary that an omission of it was looked upon as an attempt against the royal dignity, and done in dishonour of the crown. And accordingly we find, that Edward the First, in the sixth year of his reign, brought an action of ten thousand pounds damages, now at least in value thirty thousand pounds, against the bishop of Exeter, for taking homage of thirteen of his bishop's vassals, without the exception of the king; and, in the end, judgment was given against the bishop †.

OUR antient authors tell us, that the lands for which the homage was done ought to be specified in the doing homage; and the reason given is, *Ne in captione homagii contingat dominum, per negligentiam, decipi, vel per errorem*. But it was better to say, that it was for the benefit both of lord and tenant, and for the information of the *pares curiæ*, who were to judge in case of any controversy between them.

IN England the two ceremonies of homage and fealty were kept distinct; the homage, as being for the most durable estate, was performed first, and afterwards the fealty; but, on the continent, at least in some countries, I find they were blended together, by the homage being done upon oath.

ANOTHER difference between England and the continent was, that, in England, no homage was repeated to the lord's heir, by a tenant who had himself performed it to the ancestor, but homage once from the tenant was sufficient for his life; whereas, in France, new homage by the same tenant was done on the death of the lord, as we may see plainly by many instances, in the case of the kings of England and France, for the lands the former held in the latter country. Homage was the symbol of a strict and indissoluble bond between the bloods of the lord and tenant, by which they, and the heirs of their blood, were mutually disabled from doing any thing to the prejudice of the other party. The tenant, therefore, could not alien,
either

† Coke on Littleton, lib. 2. ch. 1.

either by last will or by deed, in his life-time, without the previous consent of the lord. This maxim was established partly in favour of the blood of the first tenant, which was, in fact, often the consideration of the original grant, as when the lord gave lands in marriage with his daughter, or to a son or a brother, (and even where it was not in truth so, the law presumed the blood of the first tenant was in contemplation on the strength of this maxim, *fortes creantur fortibus et bonis*, and the probability that a gallant warrior would, by a proper education, qualify his son for the same profession) and partly also in favour of the lord, that he should not be obliged to receive, as his tenant, a person that was inexpert in war; or that, if qualified, was, perhaps, an enemy to the lord, or that was previously vassal and bound to another lord who was an enemy. For in those troublesome times, the power of the crown of France, where these rules began, being greatly diminished, every lordship made a little kind of state in itself, frequently at open war; and when not so, at least in a state of suspicious peace with its neighbours; and from this state of things it happened, that the word *feud* has come in our common language, to signify a mortal quarrel, as being almost inseparable from the greater, or even lesser fiefs †.

In those times, the lord, when things grew into a more settled state, took advantage of this maxim, that the tenant should not alien without licence, and the tenants readily acquiesced, under the subsistence of the rule, as it permitted them, in their turn, to exact a fine from their under tenants, or the alienees of such in all cases of subalienation; by which means this fine at length became an established fruit of tenure. In England, however, it ceased in the case of lords that were subjects from the time of the statute called *Quia emptores terrarum*, which gave every person a free liberty to sell his lands: but the king not being named in that statute, according to the well-known legal maxim, was not bound thereby; and of course was paid fines for alienation, or by subsequent statutes a commutation for such fines by his military tenants *in capite*, to the time of the Restoration, when these tenures were entirely abolished. On the other hand, the lord was not permitted to alien, even with the consent of his superior, without the consent also of his tenant, and that for a similar reason. For if he, the lord, might so do, he might subject his tenant to one who was the tenant's mortal enemy,

and

† Houard, anciennes loix des François, liv. 2. ch. 1. Du Cange, voc. Hominium. Spelman, voc. Homagium.

and perhaps for no other reason than for serving his former lord faithfully against the new one*.

THIS last maxim once established, introduced the practice of tenants *attorning* to their lords grants of the feignory. *Attornment* is an act of notoriety, originally performed in the presence of the *pares curie*, signifying the tenant's consent, and turning over from his former lord to the new one, and the putting him, the new one, in the seizin of his services. This, at first, was merely voluntary in the tenant; but when, in England, free alienations were allowed by the aforesaid act, it was not thought reasonable that it should be in the tenant's power to defeat his lord's grant, by refusing to attorn. He was therefore obliged, by an action called *Quid juris clamat*, to appear, and to shew forth what title he had in the said lands, and whether he had any sufficient cause why he should not attorn to the grantee; and if he could not shew any, he was obliged by the judgment of the court to attorn†.

ANOTHER effect of this homage was *warranty*, which is the obligation on the lord to defend his tenant in the lands holden of him; or, if he cannot, to give him a recompence of equal value in other lands, our law went no farther; but the feudal law, if the warrantor had no lands to give in exchange, obliged him to pay the value in money. *Warranty* is derived from the word *war*, because, in those real actions, the trial was of old by combat. This obligation, indeed, subsided, as I have already hinted, long before the introduction of hereditary estates; but when these hereditary estates became common, and all the military tenures were of this sort, and estates for lives and years were only, or for the most part, socage, these last had no warranty annexed to them by law, but only by special agreement; and the warranty I am now speaking of was confined to inheritances, and of those only to such as were held by homage *auncestrel*, that is, where the tenant and his ancestors had, from time immemorial, done homage to the lord and his ancestors. Here, on account of the continued connection between the blood of both families, the law obliged the lord and his heirs to warrant the lands to the tenant and his heirs‡.

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* Wright on tenures, p. 154. et seq. Dalrymple on feudal property, chap. 2. § 2. Millar on the distinction of ranks in society, second edit. p. 215.

† Wright on tenures, p. 172.

‡ Coke on Littleton, lib. 3. chap. 13.

THE manner of taking advantage of this obligation of the lords by voucher, which still remains in our law, (the other method by disuse being antiquated) was shortly thus: When the tenant in possession is impleaded for the lands by a stranger, who claims them as his inheritance, he, the tenant appears, defends his right, and *vouches*, that is, calls in his lord to warrant the lands to him. If the lord appears gratis, and enters into the warranty, as he ought, if he is bound to warranty, the tenant hath no more to do in the defence of the suit. It is the lord's business. Against him the stranger declares, and prosecutes the suit. He defends, and it is found against him, either by legal trial, or default, for want of appearing; and the judgment the court gives is, that the demandant or stranger shall recover the lands demanded against the tenant, and that the tenant shall recover lands of equal value from the lord, or voucher, as he is termed, because he is *vocatus*, or called in to take upon himself the defence. If the lord, who is to warrant, doth not appear, he is summoned till he does; or if he appears, and will not enter gratis into the warranty, the tenant is to shew how the person he calls in is bound to warrant; which must be either by homage auncestrel, or by his, or his ancestors express covenant, as I shall hereafter shew; and until this was determined, the suit of the demandant was suspended; because as yet it was uncertain who was obliged to defend the lands. So we see in the judgment of this kind, there were in fact two judgments, one against the tenant, who was to give up the lands, another against the lord, who was to give lands equal in value. But there might be three, or more judgments, as there might be two or more vouchers, As if there be in respect to land, A, B, and C. A, lord paramount or superior, B *mesne*, that is, tenant to A, and to lord C; and C tenant *paravaile*, that is, the actual possessor of the land. Here, if D, a stranger, brings his action against C, the tenant, who vouches his lord B the mesne, who enters into warranty, and vouches A the lord paramount, who enters into warranty, and fails, D recovers the lands from C, C recovers in value from B, and B recovers in value from A, and so on, if there be more vouchers.

WARRANTIES, as I hinted before, are of two kinds, *warranties in law*, or by homage auncestrel, or by words in the deed, which the law construes to import warranty (which stood upon a feudal footing), and *warranties in deed*, that depend on a special covenant. These last were substituted in the
place

place of the former. For as by every alienation, either of the lord or tenant, the mutual connection between the two bloods was extinguished, and warranty by homage auncestrel consequently gone (inasmuch that now, by frequent alienations, there is no such thing left) the tenant would not attorn to his lord's grant when the lord aliened, nor a new tenant accept of a grant from an old tenant of his tenancy, without an express warranty, binding in the first case the new lord and his heirs; in the latter the old one and his heirs. Afterwards the making of these warranties was extended to persons between whom there was no feudal connection; as if a man aliened lands to hold of his lord. Here the grantee held of the lord of the grantor, not of the grantor; and therefore, as he had nothing to bind the lord to warranty, would insist on an express warranty from the grantor and his heirs†.

ONE species of these warranties, namely, that which is called *collateral warranties*, was made use of, and it was the first invention that was made use of, to elude the statute of Edward the First, *De donis*, which gave birth to, or rather restored to life that antient kind of feudal estate, which we call *Fee tail*. But it must be owned this intention was both against the words and intention of that law. A judge in his grandson's, Edward the Third's, reign, says, they were wise men that made this statute, and that the king that passed it was the wisest king that ever was in England, and both assertions must be allowed. The nobles who made it were wise men in their generations. For, by making effectual these gifts in tail, they secured their estates in their families, free from any forfeitures, arising from their own misconduct; which before their estates were liable to. But at the same time it was a destructive law for the nation. It put the great lords of England, who were before too powerful, in a condition, by this security of the inheritance's descending to the heirs, to beard and awe the crown, and it likewise discouraged industry and commerce, which then began to rear their heads in England. Perhaps the wisdom of the sagest of the kings of England, as he is universally called, may by some be doubted in this, that he consented to this act; but he was a sage king, and did wisely in consenting to it. The barons had been so oppressed in his father's reign, and their estates so often

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confiscated,

† Houard, *anciennes loix des Francois*, liv. 3. chap. 13. Coke, *ut supra*.

confiscated, that a mutual jealousy subsisted at that time between them and the crown. They had been restored, because the crown was otherwise in danger. They were jealous likewise of Edward himself, for one or two of his actions: In short, his barons were too powerful to be refused this law, however contrary to the interest of the crown and the lower people, and there was more to be said in its favour, it being entirely agreeable to the feudal principles, that he who received an estate to him and the heirs of his body, should not have it in his power to contravene, by any act of his, the gift of the donor. He complied therefore with a good grace; but his wisdom, if it was seen in his complying, was farther seen, and in a stronger light, in the construction his judges and their successors made of this act, that collateral warranty, without an equivalent, should be a bar. However, this was but a feeble defence against the mischiefs of entails, which every day happened, to the weakening of the public estates, and collateral warranties, were not on every occasion so easy to be got †.

At length, in Edward the Fourth's reign, under pretence of warranties, and those entirely fictitious, a method was found out, under the form of legal proceedings, to defeat estates tail, and all remainders thereon, and that in the manner following: A, who was tenant in tail, was impleaded by collusion, by a person who pretended to claim title to the lands antecedent to the estate tail, and who was, in fact, the man to whom A, by his private agreement, was to alienate it, in destruction of the estate tail. A appears, and takes defence, but vouches to warranty B, a man who has not a foot of land, nor is likely to have any: B very readily enters into the warranty; and when the day comes, that he should defend the suit, makes default; in consequence whereof, the court gives judgment, that the demandant should recover the lands against A, and A's lands of equal value against B the vouchee, who hath none; and yet this was judged a good bar to the entail, upon the possibility that B might purchase lands equivalent, and so A, and the other persons entitled in tail, might receive satisfaction. And that is what, under the name of a common recovery, is grown to be one of the common assurances of the realm; and though, for about seventy years, the justice and conscientiousness of it was disputed, yet being constantly asserted as law by the judges, and taken notice and approved of by acts

† Wright on tenures, p. 168, 169.

acts of parliament, it is the now most effectual bar to an estate tail. To speak candidly about these recoveries, as to their application to this purpose, they were notorious breaches of the statute *De donis*, under the colour of legal proceedings. Yet what could be done? the law could not be repealed; for all members of parliament had their estates entailed. It could only be eluded, and both for the king and all who had not estates tail, it was necessary it should †.

ANOTHER consequence of estates becoming hereditary, and, in respect of military tenures, a fruit of feignory, is *wardship*, or guardianship. For it must now frequently happen, by the death of ancestors, that estates would descend to heirs incapable to do the service, to manage their affairs, or to educate themselves. It was necessary, therefore, that the law should make provision both for the doing the services, and the benefit of the heir, until he arrived at a proper age. And the law proceeded in a different manner, as the lands were holden either by knights service or socage; tenure, in the first case, having in view principally the defence of the realm; in the second, the benefit of the heir. With respect to military tenures, the time of age was twenty-one years compleat; at which time the law presumed the heir was qualified, both by skill and strength of body, to perform the part of a soldier. At this age, therefore, he was out of the ward. If his ancestor died before he had attained that age, his lord had by law the guardianship both of his lands and person till then, and took the profits of the lands to himself for his own use, being only obliged to educate and maintain the heir in a condition suitable to his rank and station. The reason of this was, that it was a principle in the feudal law, as the profits and the military duties were equivalents for each other, that he who was obliged to the duty should enjoy the profits, which, in the first instance, was the lord, he being obliged to answer the king, or other superior lord, for all the military duties comprised in his feignory.

HE had the guardianship, likewise, of the heir's person; first, that, because of the bond under which he lay to the tenant and his heirs, the law had entire confidence in the care he would take of the minor; secondly, because the lord was certainly well qualified to instruct him in the art of war;

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† Wright on tenures, p. 186.

and thirdly, his own interest obliged him to do this carefully, that his vassal might be enabled to perform to him the future services. But this, as to the person, is to be understood, if the minor's father was not living. For if he was, he was guardian by nature, and intitled to the custody of the person, as in the case put by Littleton, where there is a grandfather by the mother's side, tenant, by knight service, father, and mother, and son; and the mother dies, leaving the grandfather, and then the grandfather dies, and his land descends to the son of his daughter, then a minor, the minor's father still alive; here the guardianship shall be divided. The grandfather's lord shall have the ward of the lands, and the father shall have the ward of the person of his minor son. So it is if a lord gives land in fee by military service to the son of A, by which son's dying without issue the lands descend to his brother, a minor. Here A, the father, shall have the custody of the body, and the lord, of the lands. There was another case, likewise, wherein the guardianship, I cannot say was divided, but where the wardship of the person was extinct. Antiently, although twenty-one years was the regular time, yet, if the minor was knighted by the king, and thereby adjudged capable of service in person, the guardianship ceased. For here, the legal presumption of unfitness was refused by a positive act of the king to the contrary. But the lords obtained an act of parliament, that, notwithstanding such knighthood in minority by the king, the lords should retain the lands of the minor so knighted, till he was twenty-one years of age; and so, after this act, the wardship of the lands continued, though that of the person, who was by the king's act declared *fui juris*, was gone †.

THE term of twenty-one years, which I have mentioned was confined, as may appear by what I said concerning it, to heirs minor, that were males; but with respect to heirs female, minors, as almost all of our fiefs soon after the conquest were feminine feuds, as the lawyers on the continent call them, that is, descendable to females in the next degree, if males in that degree failed, the limitation of minority was different. In these fiefs it was impossible the woman herself should do personal service: She was, therefore, allowed a substitute; but in time of minority, as she could not appoint a proper one, the lord who was bound to perform the service to his superior, had the

† Fortescue de laud. leg. Angliæ, cap. 44. Glanvil, lib. 2. chap. 9. Spel. reliq. p. 25, 26. Du Cange, voc. Warda.

the lands in the same manner as in case of an heir male. However, there was no reason that the minority of a woman in wardship should continue so long as that of a man, namely, to twenty-one years; for as the law of God declared that man and wife should be one flesh; so the canon law, and ours in consequence, have decreed, that, in law, the man and wife are one person, and that the husband in all respects is bound to perform the obligations she lies under. Hence, in case of a female heir, the term of the lord's guardianship was, by the common law, limited to fourteen years; by which time it was presumed she might have a husband capable, and obliged to do the duty for her. But this age of fourteen years was, in a particular case, extended, by act of parliament, to two years farther. However, as the reason of that depends on the lord's right to the marriage of the heiress, it will be better to defer speaking thereof, until we come to that head.

It remains to be mentioned, what was the nature of this interest the lord had in the estate of this minor tenant, by virtue of the feudal institutions, and so contrary to the general and the original tenure of them. For, simply, the lord had only the propriety, and in consequence the right of reversion or escheat, with the render of the services; whilst the tenant had the possession and the profits. But, in this case, all these seem to be blended, particularly the right of original propriety and possession, so essentially to be distinguished in the feudal system. For the lord has not only his propriety in right of his feignory, but also the absolute possession, and permanency, or taking of the profits, and the minor heir apparently nothing. However, the law, in this case, did justice, and created in the lord a temporary interest, an estate for years, namely, for the number of years till the majority was completed, contrary to all the other feudal maxims. For the fee and inheritance of the estate remained in the minor, though he had neither possession or profits. This interest of the lord could not be called, at least with strict propriety, a tenancy for years, because, in this case, the lord possesses the tenant's lands, not the tenant. The lords had therefore no tenure, but an estate for years, created by the law; and that it was originally considered as an estate for years, or a chattle interest in lands, appears from two things. First, that in the early times, when alienations were scarce allowed, it was assignable over to another, without any licence or form. Secondly, that instead of going to the heir, in case of the lord's death, during the minority

minority of the ward, it went to the lord's executors, as other estates for years did†.

As the lord was bound to his vassal and his heirs by the homage done to him, it certainly followed, that it was not lawful for him to do, during the wardship, any actual waste (that is, any permanent damage) to the estate of his minor ward, or to suffer any to be done by others. He was also obliged to repair and keep in condition, out of the profits of the estate, the houses and improvements thereon; yet so great was the misbehaviour of the English lords, soon after the conquest, that many severe and restrictive laws were, from time to time, made in favour of the minor wards‡.

IN my next I shall treat of guardians in socage, reserving the article of marriage, though it appertained to military service, to a place by itself; as it was of a distinct nature, and went on its own particular ground in a great measure.

† Craig, de feud. lib. 2. dig. 20. Wright on tenures, p. 86. et seqq. Dalrymple on feud. property, chap. 2. § 2.

‡ Ruffhead's Statutes, p. 2, 3. Bafnage, Coutume de Normandie, tit. des gardes.

LECTURE

LECTURE XIII.

Wardship in Socage—The nature and history of the incident of marriage.

HAVING, in the last lecture, given some account of wardship and guardianship in chivalry, it will be necessary to mention what provision the law made, now lands were become hereditary, for the benefit of a minor, when lands, held in socage, descended to him. In the former case, where war was the consideration, whose times and exigences were uncertain, the law was obliged, on account of the public safety, to consider the interest of the lord, who was to answer the duties to the state, in the first place, and the interest of the minor only in a secondary light. But in socage lands, which the lord had parted with for certain fixed stipulated services, to be paid at particular times, the lord had no claim to any more than them. Neither did the public interest demand a military person for the guardian of one who was not to be bred a soldier. A near relation, therefore, was the properest person to take the wardship.

But in fixing who that person should be, the feudal and the Roman civil law proceeded on different principles; the latter fixed upon the nearest relation that was inheritable to the estate, but the former entirely excluded all relations that might inherit. Thus, if the land descended on the side of the father, all relations of the father were incapable, and the mother, or the next of kin of her blood, was the guardian. And this is a difference wherein the English lawyers greatly triumph over the civilians. For to give the care of a minor to one who might be his heir, is, they say, *quasi agnum lupo committere ad devorandum*. But this very reason strongly proves the general wickedness and barbarity of the people, who were obliged to establish this rule at that time. Both laws were equally wise, because adapted each to the circumstances of the nations that made them. The Romans, who were a polished civilized people, among whom murders were infrequent,
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were not afraid to trust the person of the minor to the care of one who might be his heir; and such an one they preferred on account of the preservation of the estate, which they presumed would be taken best care of by him to whom it might descend. The northern nations, on the contrary, who were barbarians, and murderers, were obliged to sacrifice the consideration of preserving the estate, to the personal safety of the infant, and therefore committed both to one who could have no interest in the succession.

THE guardian in focage differed from guardian in chivalry in this, that he was but in the nature of a bailiff, or trustee, for the minor, to whom, at the expiration of his guardianship, he was obliged to account, upon an allowance of all his reasonable costs and charges. Another difference was, as to the *term* of the guardianship. For this guardianship expired at the ward's full age of fourteen; at which time, if he pleased, he might enter and occupy the lands himself, or choose another guardian; for as at that age he had discretion enough to consent to marriage, so did the law suppose he had sufficient perhaps to manage his own affairs, at least to choose the properest person for that purpose †.

BUT put the case, Suppose that the minor doth not enter, or choose another guardian, but that the old one continues to receive the profits, what remedy shall the minor have for those received after his age of fourteen? Certain it is, he cannot bring an action of account against him as guardian; for guardianship is expired; and yet the infant's discretion cannot be presumed so great, as to be perfectly acquainted with all his legal rights, and therefore his negligence shall not be imputed to him. The law in this case remedieth him by a reasonable fiction, and supposeth, though the fact hath not been so, that the minor had appointed him to receive the profits of the estate, and therefore gives an action of accounts against him, not as guardian, but as bailiff or receiver.

BUT suppose the next of kin neglects the guardianship, and any other person of his own head enters, and takes the profits, what remedy shall the minor

† Coke on Littleton, lib. 2. ch. 5. sect. 123. Houard, *anciennes loix des François*, liv. 2. ch. 5.

minor have? In this case the law will not suppose him that enters to be a wrong doer, an *abator*, as the law would call him, if the heir was of full age; but will rather presume his act proceeded from humanity and kindness, to supply the neglect of the proper guardian; and therefore, though he is not appointed guardian, either by the act of law or otherwise, he shall be considered as such, and the heir, after fourteen, shall have an action of account against him, and charge him as guardian. So strictly was the guardian in socage accountable to his ward for the profits, that, if he married him within the age of fourteen, he was not only accountable for the money he received in consideration thereof (as it was the practice in those days to sell the marriage of wards) but if he received none, he was accountable out of his own fortune for what he might have received on that account, unless the match itself was equally, or more beneficial.

THE next consequence of fiefs becoming hereditary, and which followed from the wardship, is the *marriage* of the ward by military service, which belonged to his lord, and was one of his beneficial fruits of tenure; and although this part of our law is now antiquated by the abolishing of knight-service, it is necessary, for the understanding our books, to have at least a general notion of it.

THIS right rose originally, on the continent, from fiefs becoming descensible to female heirs, and was grounded upon the same principle as the rule which forbade vassals to alien without their lords consent. As every feudal kingdom, at this time, consisted of a number of principalities, under their respective lords, who were often at war with each other, the tenant could not alien without his lord, lest he might introduce an enemy into the feudal society. The like danger was there if a female heiress was permitted to marry at her own pleasure, or could be disposed of by her relations without the lord's consent. And at first, it seems, that this rule was general to a woman heiress during her whole life; but if so it was, it soon abated, and was confined to the marriage of females in wardship, and to the first marriage only. The law of Normandy says, if a woman be in wardship, when she shall be of an age to marry, she ought to marry by the counsel and licence

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of her lord, and by the counsel and assent of her relations and friends, according to what the nobleness of her lineage and the value of her fief shall require. So that antiently the lord had not the absolute disposal of her, nor had he any thing to say to the marriage of males; for though he should marry an enemy, the fief was not thereby put into subjection to her, but she into the subjection of the vassal. And this rule, that the lord's consent should be had, was not intended for him to make an advantage of, but was a mere political institution, for the safety of the community. Such was the law introduced into England at the conquest. However, it was but natural to expect that avaricious lords would take advantage of their negative voice, to extort money for licence, and by that, and their influence over their vassals, to arrogate the sole power to themselves. That William Rufus acted thus, we may well learn from the remedial laws of his brother and successor Henry the First; *Si quis baronum, vel hominum meorum, filiam suam nuptum tradere voluerit, sive sororem, sive neptem, sive cognatam, mecum inde loquatur; sed neque ego aliquid de suo pro hac licentia accipiam, neque ei defendam quin eam det, excepto si eam jungere velit inimico meo.* Another is, *Si mortuo barone, vel alio homine meo, filio hæres remanserit, illam dabo consilio baronum meorum* †.

NOTWITHSTANDING these laws, the mischief still gained ground, and the lords extended their encroachments, until they not only got the absolute disposal of female, but of male heirs also. When this happened, is hard to determine precisely. That it was after Glanville, who wrote in Henry the Second's time, and before Bracton, who wrote in Henry the Third's, is plain: Mr Wright's conjecture seems probable, that it grew up in Henry the Third's time, when the barons were very powerful, from a strained construction of Magna Charta, which says, *Hæredes maritentur absque disparagatione*; where the general word *hæredes* should have been construed to extend only to such heirs as by the former law were marriageable by their lords, namely, female ones; but both king and lords, taking advantage of the generality of the expression, claimed and usurped that of the son's also ‡.

HOWEVER,

† L L. Henry 1. c. 1. Bracton, lib. 2. c. 37. sect. 8. Craig, de feud. lib. 2. Diegef. 21. Du Cange, voc. Maritagium. Glanvil, liv. 7. c. 12.

‡ Wright on tenures, p. 97.

HOWEVER, it is rather to be presumed that this incroachment began earlier; since in the statute of Merton, the twentieth of Henry the Third, we find these words: *Quia maritagium ejus qui infra aetatem est* (speaking of a male) *mero jure pertinet ad dominum feudi*. From whence I rather gather the practice was earlier than Magna Charta, which was not above thirty years before, and confirmed by its interpretation. But if, in this respect, the vassals were encroached on by their lords, in another, they met with a mitigation in their favour. For the consent during the father's life, went into disuse, and every man was allowed to marry his son or daughter at his pleasure; and this with very good reason. For as the prohibition was for fear of introducing an enemy, of this there was no danger where the marriage was by the father, a vassal, bound by homage and fealty to do nothing to the prejudice of his lord. Thus was right of consent to marriage, introduced first for political reasons, turned into a beneficial perquisite, and fruit of tenure, for the advantage of the lord; and notwithstanding all the laws made to regulate it, as constantly abused; so that the evils thence arising were not among the least causes for abolishing military tenures †.

THE penalty for marrying without consent was originally, as all breaches of fealty were, absolute forfeiture. But the rigour of the feudal law subsiding, lighter penalties were introduced. By the sixth chapter of Merton remedy is given to the lord, whose ward, under fourteen, has been taken away by any layman (and a later act extends it to the clergy) and married, by an action against the *raptor* or *ravisher*, as he is called, for the value of the marriage, besides imprisonment and a fine to the king. If the ward himself, after the age of consent, or fourteen, should, to defraud his lord, marry himself, he, as guilty of a breach of fealty, is more grievously punished than a stranger. For this act provides, that the lord, in that case, shall retain the lands after the full age of twenty-one, for so long a time as, out of the profits, he might receive double the value of the marriage ‡.

THE next, the seventh chapter, is in favour of the ward, and an enforcement of that chapter of Magna Charta which forbids disparagements with-

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† Ruffhead's statutes, fol. p. 19.

‡ Ibid. p. 6.

out inflicting any penalty. It enacts, that if the minor under fourteen is married by his Lord to his disparagement, upon the complaint of his relations, the lord shall lose the wardship; and the profits of the lands, till full age, shall be received by the relations so complaining, and laid out for the benefit of the heir. But if the marriage was after fourteen, the age of consent, it was no forfeiture, on the maxim, *Volenti non fit injuria*. This act goes farther in favour of the minor; for it gives him a liberty of refusing any match the lord should offer him. But to prevent the lord's entirely losing the benefit of the marriage by the refractoriness of the ward, it enacts, in this case, that if he refuses a convenient marriage, the lord shall hold the lands after twenty-one to his own use, until such time as his late ward shall pay him the single value thereof.

THE twenty-second chapter of Westminster the first confirms and repeats the sixth of Merton, and farther obviates a fraudulent practice of the guardians of female heirs. I observed that their wardship by law ceased at the age of fourteen, by which time they might have husbands capable of the service: but some lords, *for covetousness of the lands*, as the act expresses it, would not offer any match at all to their female wards, under the pretence of their being incapable of the services, in order to hold on the lands for an unlimited time. This act so far alters the old law, that if the heiress arrives unmarried at the age of fourteen, the lord should hold two years longer, that he may have time to look out for a proper match to tender her, within which time, if he neglects it, he loses all right to her marriage. On the other hand, if the heiress will refuse a suitable offer, the lord is impowered to retain the lands until twenty-one, and so much longer, until he has received out of the profits satisfaction for the value.

THE ravishment of wards from their lords continuing, notwithstanding the statute of Merton, the thirty-fifth of Westminster the second gave the writ called *Of ravishment of ward*, and assigned a more speedy and beneficial method of proceeding, and added to the punishments by the former act of Merton inflicted on offenders †.

BUT

† Coke's institutes, part 2. p. 440. Ruffhead, vol. I.

BUT notwithstanding all these regulations concerning marriages, and the other many acts made to prevent misbehaviour of lords to the lands of their wards, the source of the evil remained in the wardship itself; and the evils constantly followed, insomuch that for hundreds of years, it was one of the heaviest grievances the subject suffered. Many were the wastes done to estates; many the heirs married contrary to their inclinations, and frequently unsuitably. The grievances fell heaviest on the wards of the crown. There were always a set of needy or greedy courtiers ready, if they had favour enough to beg, or otherwise to buy at an under rate, the wardships of minor tenants, of which they were sure to make the most advantage; marrying the most opulent heirs to their own children, or relations, or extorting extravagant sums for their consent. A remarkable instance of this happened so lately as Charles the First's time, in the case of the earl, afterwards first duke of Ormond. A long suit had subsisted between the lady Preston, grand-daughter and heiress at law of Thomas earl of Ormond, and her cousin, the heir male of the family, for that part of the estate her grandfather had entailed to go with the title. At length the relations on both sides thought the best expedient to end this intricate dispute, was by uniting the young relations, who likewise had conceived a strong affection for each other; yet, although the king approved highly thereof, did the earl of Warwick, who was grantee of the young lady's wardship, extort ten thousand pounds before he would consent to a marriage on every account so desirable.

KING Henry the Eighth, finding how grievously the subject was oppressed, and how much the crown was defrauded, erected, by act of parliament, a court called the *Court of Wards*, to take proper care of minors, and to answer in a moderate manner for the profits to the king. This for some time was a considerable alleviation of the load; but in the weak reign of James the First, who was governed by his favourites Somerset and Buckingham, this court was converted into an engine for raising their families, by providing their numerous and indigent relations with the greatest heiresses, to the great discontent of the antient nobility, who saw the most opulent fortunes suddenly raised by private gentlemen, dignified by titles for the purpose. And great were the extortions likewise for the licenses that were granted to some to marry at their pleasure. The only advantage the public
reaped

reaped at this time from this right of disposal in marriage was, and it must be allowed to be a considerable one, the opportunity it gave the crown of breeding the heirs of many families in the reformed religion; and in justice, it must be owned, this was not neglected.

IN the eighteenth year of this last reign, it was moved in parliament to purchase off these heavy burthens of ward and marriage, by settling an handsome yearly revenue in lieu thereof on the crown. But the attempt did not succeed at that time, probably owing to the courtiers opposition to it, from their own interested views. In Charles the First's reign, this court was one of the great objects of complaint. At length, on the restoration, the king consented to turn all the military tenures, except grand serjeanty, into socage, in consideration of an hereditary revenue settled on him, and so all the fruits thereof ceased, and the feudal system, which had for ages, from time to time, undermined the constitution, fell to the ground, though very many of the rules of our law, founded on its principles, still retain their force †. In this kingdom the equivalent given for this abolition was the tax of hearth-money, in which, it must be owned, the king, and those who had been his military tenants, were a little too sharp for the rest of the people; for by the improvements of the kingdom, that revenue is every day increasing to the crown, and almost the whole burthen is thrown on the lower class, who before felt none of the oppression, or weight of wardship and marriage.

† 32 Henry VIII. c. 46. . 12 Car. II.

LECTURE

L E C T U R E XIV.

The rules of descent in the old feudal law in regard to the sons of the last possessor—Representation and collateral succession—Feminine feuds.

IT is now time to see how inheritances descended by the feudal law, where, in the original grant, there were no particular directions to guide the descent; for in such case the maxim of the feudal law holds, *Tenor investituræ est inspiciendus*; or, as the common law expresses it, *Conventio vincit legem*. The first rule then was, that descendants of the first acquirer, and none others, were admitted. The reason was, that his personal ability to do the duties of the fief was the motive of the grant, together with the obligation his fealty laid him under to educate his offspring to the lord's obedience, and to qualify him for his service in war. It was observed, therefore, it should go to the first purchaser's collateral relations, whom he had no power to bind by his acts, and over whose education he had no influence. I mean where it was not particularly otherwise expressed; for then the collaterals succeeded, as the merit of their blood was part of the consideration; not so properly in the right of heirs, as by way of remainder, under the lord's original grant†.

THE next thing to be enquired is, since the descendants alone inherited, whether all, or which only of them inherited. And here the females and their descendants, unless they were specially named, were totally excluded, not merely for their personal incapacity, but lest they should carry the fief to strangers, or enemies; and therefore, where they were admitted, they were obliged to marry with the consent of the lord. The third rule is, that, unless it was otherwise stipulated, all the sons succeeded equally to the father. This was the antient feudal law, and the law of England in the Saxon times, the relics of which remain in the gavel kind of Kent, and remained in the last century in many, if they do not still in some of the principalities of

† Craig, de feud. lib. 2. Dieges. 13. Dalrymple on feudal property, ch. 5. sect. 1.

of the empire. In France, during the first, and a good part of the second race, we see the kingdom divided among the sons. There are not wanting instances of the same among the English Saxons; and the Spaniards continued the practice now and then even in later ages. But the frequent wars, occasioned by these partitions, at length abolished them, and made kingdoms to be considered as indivisible inheritances. In imitation of the sovereignty, the same alteration was introduced into the great feignories, which made, at this time the principal strength of the kingdom, and which, now the crown was become indivisible, would, if liable to partition, become so inconsiderable in power, as to be at the mercy of the king †.

The inconveniencies attending the lower military tenancies which still continuing divisible, were crumbled into very small portions, and, of course, must have fallen into indigent hands, were such, that these also, for the most part, became descendible to a sole heir. But this, however, was not effected but by degrees; for in the reign of Henry the First, though a single knight's fee was not divisible, yet when a man died seized of more than one, they were distributed among his sons as far as they went; but in his grandson's reign the general law was settled in favour of a single heir, in the same manner as it has stood ever since ‡.

BUT it remains to be enquired which of the sons, in case of an indivisible inheritance, should be this sole heir. In the antient and unsettled times, the law made no particular provision; but, as the lord was the head of the military society, and bound to protect it, it was left to his option to fix upon the properest person to do the duties: and an instance of the exertion of this power we have in England so late as the reign of Henry the Second, who gave the entire military lands of Geoffry de Mandeville to his son by a second ventre, to the exclusion of the eldest by a former wife, for this reason, *eo quod melior esset miles*. A trace of this still remains in the case of a peerage, descendible to heirs general, that is, male or female, falling to daughters. Here the fief being indivisible, the king may appoint the peerage to which he pleases, and until he doth so, it is not indeed extinguished, but lieth dormant, being what is called *in abeyance*, or the custody of the law

† Craig de feud. lib. 2. dieges. 14.

‡ Bafnage, coutume de Normandie, tit. De partage d'heritage. L L. Hen. 1. 70.

law. But at length this uncertainty was removed, and the eldest son being generally the best qualified, and consequently almost always chosen, obtained the right, by degrees, in exclusion of his brethren, or the choice of the lord†.

BUT it will be inquired with respect to kingdoms, who had no superior to make the choice, how was it to be determined after they became indivisible, which of the sons was to succeed, seeing the absolute right of primogeniture was not yet established in the opinions of men. I answer, the usual practice was for the king himself, before his death, to appoint the successor; generally with the consent and approbation of his states, and sometimes merely by his own act, which was almost universally allowed, and obeyed by the people. But if no such disposition had been made, the states assembled, and chose the person themselves; and these appointments generally falling on the eldest son, paved the way for lineal hereditary succession, though the case was not always so.

IN France, Hugh Capet, to go no higher, in order to prevent competition, caused his son Robert to be crowned, and sworn allegiance to in his lifetime; but Robert neglecting the same precaution, Henry his younger son was chosen in preference of the elder, who was obliged to content himself with the duchy of Burgundy. And if Henry was an usurper, so were all the succeeding kings of France for three hundred years, till that family of Burgundy failed. Henry followed his grandfather Capet's example, and so did his successors for about an hundred years, and then, the notion of the lineal succession of the eldest son being fully established, the custom of crowning the son in the father's life, was laid aside, as unnecessary.

IN England the practice was antiently the same. William the Conqueror, though he set up a claim under Edward the Confessor's will, yet as that never appeared, a formal election by which he was chosen, extorted indeed by dread of his power, but apparently free, was his title. When pressed to declare a successor, he only signified his wish that William might succeed, but declared he would leave the people of England as free as he had found them. William accordingly was elected in prejudice of his elder brother Robert, and upon his death, occasioned by an accident, Robert

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† Dalrymple on feud. property, chap. 5. § 1. Hume, appen. 2.

was again excluded, and Henry the First, the third brother, chosen. Henry was willing to have the course of descent secured in his offspring; and for this purpose proceeded in the method that had been so successful in France, namely, by causing his son Henry to be crowned, and sworn to. But this latter dying childless in the lifetime of his father, king Henry caused his daughter Maud to be acknowledged successor, and the oath of eventual allegiance to her to be taken by his people. However, this project did not succeed. No nation of Europe had yet seen a crown on the head of a female; and Spain was the only country that had ever had a king who claimed in a female right. The majority, therefore, upon Henry's death, looked upon their oath as inconsistent with the nature of monarchy, and void, and in consequence chose Stephen, who was the son of Maud's aunt, and grandson of the Conqueror, whose whole male issue was now spent. There was, however, a large party in the kingdom who paid a greater veneration to the obligation of their oath, and adhered to Maud. Hence was this reign a continued scene of civil war, until all sides, being wearied out, by mutual consent, ratified by the states of the kingdom, Stephen was allowed king for life, and Maud's personal pretensions, as a woman, being set aside, her son, Henry the Second, was declared, and sworn to, as eventual successor†.

HENRY the Second followed the example of his grandfather, and had his eldest son Henry crowned; but that ungrateful prince conspiring and rebelling against him at his death, which likewise happened in the lifetime of his father, the old king fearing the like consequences, refused to crown his next son Richard; who conscious of his own ungrateful conduct, and suspecting that this refusal proceeded from partiality to John, the youngest and favourite son, stirred up those commotions and rebellions which broke his father's heart. Richard was the next heir, and did succeed, but not merely in the right of next heir; for he assumed no title but that of duke of Normandy, until he was elected and crowned. The title of John was notoriously by election, and his son Henry the Third was the first who was introduced to his subjects by the words, *Behold your king*, or words equivalent. Those few who adhered to his father, immediately swore to him; but

† Hale's hist. of the common law, chap. 5. Bacon's hist. and polit. discourse on the laws and government of England, part 1. chap. 45, 55, and 56.

but the majority, who were disaffected, did not submit but upon terms, the restoration of the charters.

FROM that day the lineal succession has been established, and the crown is vested in the successor upon the death of his ancestor, and the maxim prevailed of the king's never dying; whereas before, the crown was in abeyance, till coronation, and the date of the king's reign was taken, not as now, from the death of the former monarch, but from the day that the succeeding one was crowned. Henceforth coronation became a mere ceremony, though the form of an election is still continued in it. I have been more particular in this detail, in tracing the origin of the hereditary descent of the crown, to shew how false in fact, as well as in reason, the notion is of its being founded either on divine right, or on any law of man coeval with the monarchy†.

HAVING laid down the rules of descent in the old feudal law, in regard to the sons of the last possessor, it will be proper next to mention how far it admitted representation, or collateral succession; for at first both were excluded. If a man had two sons, one of which died before him, leaving a son, the grandson could not succeed to his grandfather, but the uncle was sole heir. This was grounded partly on the presumption that the uncle was of more mature age, and better qualified to do the service; but this could not be the only reason, for the rule was general, and held where the grandson was of full age and capacity. We must have recourse, therefore, to a farther cause, which was also the same that, in those old times, prevented collateral descents; for if a man had two sons, by the old law, the estate was divided between them. If one of these died without issue, the brother did not succeed to the share of the deceased, but it reverted, as an escheat, to the lord. The reason of both these was, that he that claims by descent, must claim through the last possessor, and derive his right from him; and that right arose from the supposition of his being educated in the fealty of the lord, that is, by the last possessor who had sworn fealty. Therefore the grandson, being educated under the *patria potestas* of his father, who, dying before the grandfather, had never taken the oath of fealty, was excluded the succession, as not trained up by a real tenant; but the uncle was ad-

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† Id. chap. 57. See also Tyrrel's history, and Kennet's historians.

mitted to claim from the grandfather, the tenant under whom he was bred†.

THIS rule was of some advantage to the feudal system at that time, as it frequently prevented the too great crumbling of fiefs, when almost all of them were divisible. For the same reason a brother could not succeed to a brother, even in a paternal fief, because he was not educated by the last possessor that had done fealty: and though this seems very unreasonable, as he had been bred in the fealty of the lord, namely by the father, yet this rule continued for ages, being greatly for the advantage of the king and the great lords, in regard to their escheats; as every failure of a lineal descent occasioned them to happen. Neither was it thought severe in those early ages by the tenants. As all benefices were originally for life, it was a great advantage to have them made descendible even under these strict limitations‡.

AT length the necessity of Charlemagne's grandsons, who had parted the empire, and were in eternal broils, extorted from them, in France, a grant of the grandson's succeeding in his father's share, by way of representation, in imitation of the civil law, and also of brothers succeeding to brothers in a paternal fief, but not in a new one. And about an hundred and fifty years the like necessity of the emperor Conrad, who was embroiled with the Pope, procured the same law for Germany and Italy||.

THE extension of the right of collateral succession beyond brothers grew up by degrees, not from any positive law. It was first extended to uncles and cousin-germans, provided it was a fief descended from the grandfather; afterwards to any the next cousin, to the seventh degree, descended from the first purchaser; and at last to any, however remote, who could prove their descent from the first purchaser. This was the rule in ancient inheritances; but with respect to new ones, lately acquired, there grew up a practice of granting them *as ancient ones*; *feudum novum, ut antiquum, datum*. Here the fief, though really new, was, by means of this grant, supposed

† Glanvil, lib. 7. cap. 3. Craig de feud. lib. 2. dieges. 15. Dalrymple on feudal property, chap. 5: § 2.

‡ Lib. Feud. 2. tit. 12.

|| Lindenbrogius, cod. leg. antiq. p. 679.

posed to proceed from some indefinitely remote ancestor, at any distance; and therefore any one, who could prove himself descended from a common ancestor of the last possessor, was admissible, and he that was nearest by the rules of succession was preferred. In this case, therefore, the old rule of requiring a proof, that the person claiming as heir was a descendant of the body of any ancestor of the last possessor, would be absurd, as defeating the tenure of investiture. Any ancestor *pro re nata* might be supposed the first purchaser, to support the intention of the donor, in his directing it to be considered as an ancient fief, although in fact modern. So in this case, if the fief was masculine, any male relation, descended from male blood entirely, was inheritable, even up to Adam, I mean, if he could prove his descent; but females, and their descendants were excluded†.

If it was descendible to females, either by the particular terms of the grant, or by the general law of the country, then, as it was supposed to descend from any lineal ancestor *pro re nata*, that ancestor might be a female, and the descendants of females, and they themselves might be admissible. The rule then was, to establish in this case of a fictitious descent, the same regulations as in the case of a real one. But here the root from whence the right of descent was to spring, was inverted; for as there was no real ancestor, an original purchaser, the person last seized, that is possessed of the fee, was the person to be considered. As in the old and common case of inheritances descending, the reckoning was downwards from the first acquirer; in case of collaterals, when they were admitted, you begin to reckon lineally upwards, and at every step enquire for collaterals descended from that lineal ancestor you are upon at the time‡.

A MAN purchases *feudum novum, ut antiquum*, and dies without heirs of his body. This feud is, by the constitution of it, presumed to have descended from some of his ancestors. To find out who is that ancestor, it was likely to have descended from, you must look at the law of descents: the father, in the first place, is supposed the person. His children, that is, the brothers or sisters, or their descendants, in the first place; if none of them, the grandfather by the father is supposed the person; then the grandfather's descendants. The uncles and aunts by the father, and their descendants,

† Dalrymple on feud. property, chap. 5.

‡ Craig. de feud. lib. 2. dieges. 14.

descendants, succeed in the second place. If none of them, then the great grandfather's by the grandfather and father descendants, the great uncles and aunts, and their posterity; and if there are none of them, you still go a step higher in the male line, till you can trace it no farther. But now you begin to invert the rule of tracing up in the male ancestors, and so downwards, and trace up to the female ancestor of the males, as supposing the estate descended from her, or her ancestors. For instance, I have supposed the descendants of the male line have failed in the great grandfather. His wife, therefore, the great grandmother, is supposed the first purchaser; for, upon account of the probability of the inheritance coming through males, I trace up to her through the father and grandfather; her heirs, therefore, shall succeed, first, lineal, then collateral, in the same manner as if the estate had descended from a remote ancestor of her's. If none such can be found, we descend another step, namely, to the grandmother by the father, and suppose the estate to have come from her line; and then heirs, first lineal, then collateral, succeed according to their several ranks. If none of these, so that there is no kindred on the side of the father, the presumption is, that this supposed antient feud came from the mother's family, and therefore the heirs of her male ancestors are to be traced up, and discovered in the same manner; and whenever they fail, the heir of the most remote female ancestor, all through males; and failing them, the heir of the next most remote, and so on, until the blood of the mother is spent; and then the estate, for want of heirs, reverts to the lord, of whom it is holden.

SUCH is the rule of descents of new purchases granted as if they had been ancient inheritances; but this rule was, on the Continent, and anciently in England, confined to such grants, and them only, wherein this clause appeared in the investiture. But in the reign of Stephen, his necessity of gaining adherents, and the same necessity of his competitor Henry the Second, occasioned so many grants of this kind to be made, some originally, and others on the surrender of old ones, that it hath since become the common law of England, that purchases, that is, new acquisitions, are descendible to any relation, however remote †.

It will be necessary to say something as to *feminine feuds*, which are a deviation from the strict principles of the ancient law, which excluded them and their

† Hale, hist. com. law, chap. 9.

their descendants entirely. They first arose from the woman's being the principal consideration of the grant; as when a lord gave lands in marriage with his daughter, sister, niece, kinswoman, or any other female: here the lands being partly given in consideration of the female blood, it was reasonable they and their descendants should be inheritable. But this was still an exception to the general law, and confined to those grants wherein it was mentioned, until the number of those grants, at length prevailed to have this order of succession considered as the general law, and the succession of males remote, in exclusion of a nearer female (as in case of tail male) considered as an exception. The monarchy of France, however, and of many of the principalities of Germany, have retained the antient feudal law, in absolutely excluding females and their descendants.

THE descent of imperial crowns to females, was of a much later date, than that of lower siefs: for here a manly capacity was looked upon as indispensibly requisite. The first step was admitting a male representative for them, a husband or a son. This began in Spain. Pelagius, who was of the blood royal, having gathered a few of the Spanish fugitives together, after the Moorish conquest, founded a pretty monarchy in the mountains of Asturias. His son Favila dying without issue, the crown was given to his daughter's husband, and this continued the rule for many ages, where males failed. But where the son of such female heir was of sufficient age to mount the throne, he of course excluded both mother and father. At length, in the thirteenth century, Europe, for the first time, saw a woman solely invested with royalty, Joan the first of Naples; for Henry the first of England's project in favour of his daughter Maud, as we have said before, had miscarried. Margaret of Denmark, Sweden and Norway, Joan the second of Sicily, and Isabella of Castile, followed in the next century. In the following century came Mary and Elizabeth in England, and many since in all parts of Europe; so that at present the monarchies of Europe are descendible to females in general, if we except France, and several but not all of the principalities of the empire. Bohemia and Hungary have received a queen in the person of the present empress in this present century, but so inveterate are old customs and opinions, that when her faithful Hungarians resolved to assist her to the last extremity, it was by saying, *moriatur pro rege nostra Maria Tereza*, not *pro regina* †.

LECTURE

† Giannone's hist. of Naples. Selden's tit. hon. part 2. chap. 9.

LECTURE XV.

The difference between allodial and feudal lands—The restrictions on the feudal law—The decay of these—The history of voluntary alienations.

ONE great and striking difference between allodial and feudal lands consisted in this, that the former entered into commerce. They were saleable or otherwise alienable, at the will of the possessor, either by act executed, and taking effect in his lifetime, or by will, to take effect after his death. They were likewise pledges to the king for the good behaviour of the owner, and therefore for his crimes forfeitable against him and his heirs. They were also security to his fellow subjects for the debts he might contract; and, therefore, by following the due course of law, attachable and saleable, to satisfy the demands of a just creditor†.

IN every one of these respects did fiefs, when they became descendible inheritances, differ from them. The possessor was but an usufructuary, and his power over his lands was checked and controlled by the interest others had therein. These were the lord and the persons descended from the first purchaser. The consent of the lord was absolutely necessary to the tenant's alienation, to prevent the introduction of an enemy or unqualified person into the fief; but the consent of the lord alone was not sufficient, if there were in being any persons entitled to the succession. Thus if A. is himself the first purchaser of a fee, and hath a son, his alienation, even with the consent of the lord, would hold good only during his own life; but if he had aliened with the consent of the lord before issue had, this should be valid, and bind the issue born afterwards. For here the alienation was made by all the persons in being interested in the land, and the former contract is by their mutual

† Bouquet, le droit public de France, p. 30.—36.—Allodium, proprietas quæ a nullo recognoscitur. Tenere in allodium, id est, in plenam et absolutam proprietatem. Habet integrum ac directum dominium quale à principio de jure gentium fuit distributum et distinctum. Du Moulin, de l'ancienne coutume de Paris, art. 46.

mutual act dissolved, nor is there any wrong done ; for it is an absurdity to say that a person not *in rerum natura* can suffer wrong : the consent therefore of the son, or sons, if one or more of them were in being, was as necessary as the lord's in this case.

If the lands descended from B. the first purchaser, to his son A. before the introduction of collateral descent, the law was the same ; but when these were admitted, it varied for the same reason. A. could not alienate with the consent of the lord and his sons, without the consent also of all the collaterals intitled, that is, all the *agnati*, or male descendants of B. for this would strip them of their right of succession. If it descended from C. the grandfather, or from any more remote ancestor, the consent also of all the male descendants of the grandfather, or that remote ancestor was required, upon the same principle. By this we see, it was next to an impossibility, that an estate which had been any time in a family (so many consents were required) could be alienated at all. However, there was allowed by that law a transfer of the fief in a particular case, even without the consent of the lord. This was called *refuting the fief*; it was a resignation of it to the person who was next in order of succession. Here was no injury done to the lord, or the *agnati*, because it went in the same manner, and to the same persons, as if the refuter was absolutely dead, & *quisque juri suo renunciare potest*. For the same reasons no testaments of lands were allowed, except the lord, and all others concerned were present and consenting ; which scarce ever happening, it became a maxim of the English law, that lands were not devisable by will.

NEITHER were the feudal lands originally forfeitable for the crimes of the possessor for any longer time than his own life, if there were persons entitled to the succession. But this rule of forfeiture was afterwards extended to the issue of the criminal : for as the right of succession depended much on the supposition the successor was educated in the fealty of the lord, this presumption ceased where the father had actually broke his oath of fealty. And at length, when the rule was established, that every person must claim through him that was last seized, and make himself heir to him, the delinquency of the predecessor became likewise a bar to collaterals.

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FEUDAL

FEUDAL estates also were not liable to the debts contracted by the feudatory. For if the creditor might have sold them for debt, a wide door for alienation had been opened, by means of fictitious debts, contracted by collusion between the creditor and vassal. Or even if they were honest ones, the lords and the heirs would have been deprived of their right. Neither could the creditor attach the profits of the land during the life of the debtor; for if he could, an improvident vassal might so impoverish himself, as to be incapable of the duties of the fief.

SUCH and so strong were the restrictions this old law laid on the feudatory. But as times grew more settled, and the strictness of the military system abated; as commerce increased, and with it luxury, the propensity to alienation grew up, and became at length so strong, in every country, as to be irresistible. And it is a speculation not only curious, but very useful for the students of our law, to observe and remark its progress in England †.

THE first step towards voluntary alienations arose from the practice of subinfeoffing. Originally, as I observed in a former lecture, although the vassals of the king could infeoff, their vassals could not; but at the latter end of the second race in France, when the power of the crown was declined, and the great lords were in reality sovereigns, acknowledging only a nominal dependance on the king, some of them, in order to strengthen themselves, and to increase the number of their military followers, allowed this privilege not only to their immediate vassals, but to sub-vassals also, to an unlimited degree. And when this practice was once begun, the other lords, for their own security and grandeur, were obliged to follow the example. This practice of subinfeuding contributed much to the power of the lords, and therefore was by them encouraged. But though it was intended, at first, only to extend to part of the vassal's fief, the usage of subinfeuding the whole gained ground, to the great prejudice of the heirs; when the terms of subinfeudation were no better than those of the first grant; and of the lords also, who thereby lost frequently their profitable fruits of tenure, their reliefs, wardships, and marriages; which, with respect to the lords, was remedied in the reign of Edward the First, by the statute of *Quia emptores terrarum* before mentioned ‡.

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† Dalrymple on feud. property, ch. 3. sect. 1.

‡ Lib. 4. feud. tit. 34. Ruff head's statutes, v. 1. p. 122.

IN the mean time, free alienation was allowed in cities and boroughs ; partly because many of these were old Roman towns, and their lands and houses allodial, and because those which were not so were founded by lords on the same principles for the benefit of commerce, which could never have flourished if a debtor had not full power over his property of all kinds to satisfy his creditor ; and if the creditor, in case he was unwilling, had not power to compel him to sell for his just satisfaction. Alienations, however, of one kind were permitted, namely, the founding of monasteries, and endowing of churches. These, through the superstition of the times, were looked upon as being equally beneficial to the feudal society as subinfeudation, by engaging God in their interest ; and even if the lords and their heirs, who suffered by these grants, were willing to dispute them, they were unable to contend with the omnipotent power of the pope and the clergy ; until at length the tyranny of the first, and the avarice of the last, provoked both king and people to restrain them by the acts against Mortmain. But no other alienations were yet allowed without consent, as before mentioned †.

IN the reign of William Rufus a particular matter occurred, which opened a way for alienation without the lords consent, and occasioned a prodigious revolution in the landed property of Europe. This was the madness of engaging in crusades for the recovery of the Holy Land. A crazy friar returning from a pilgrimage to Palestine, where he saw the Christians maltreated, began to preach up this expedition as the most meritorious of works ; and it is wonderful with what an epidemical contagion the enthusiasm spread through all ranks of people. These pilgrims, who assumed the cross, had no way of defraying the expence, but by the sale of their lands, which their lords, if disinclined, dared not to gainsay, or obstruct so pious a work. But indeed, most of them were conscientiously affected with the same madness, as may be seen by the great number of kings, princes, and lords, that beggared themselves in these fruitless enterprizes ‡.

† Gibson, cod. jur. eccles. Anglican. tit. 28.

‡ Kennet's collection of historians, vol. I. p. 116. Carte, hist. of England, vol. I. p. 469. 555.

THE pope and the kings concurred in inflaming this superstition, but from different motives. The pope did it out of ambition and avarice. The former he satisfied by declaring himself the head of the expedition, and thereby attaching to himself and his see such multitudes of redoubted warriors by the strongest of bonds, conscientious superstition. And indeed successors in that chair afterwards made very good use of this example, by preaching up crusades against such Christian kings and princes as disobliged them. But the more immediate advantage he received, was the glutting his avarice by a proper sale of dispensations to such as had rashly taken the cross, and afterwards found themselves unable, or unwilling to fulfil the obligation. The reason that induced the kings of Europe to promote this spirit, I mean such of them as were not possessed with the frenzy themselves, was the hope of abasing their too great and powerful vassals, which would naturally follow from the alienation of part of their lands, to equip them for the expedition; and a desire to facilitate the partition of these great seignories among females, when the males were so frequently and miserably slaughtered †.

So many were the alienations of this kind, and so long were they continued, that it is no wonder that the interest of the lord and the heirs began to lose ground in the opinions of the people, which proceeded so far, as that, in the other cases, the lord, on the payment of a moderate fine, either before or after, was looked upon as obliged to consent to the alienation. Let us now see how the liberty of alienation gained ground, particularly in England.

IN Henry the First's time, a man was allowed to alienate his purchase, but not an estate that came by descent. This law says, *Acquisitiones suas det cui magis velit; si Bocland autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam* †.

THIS liberty of alienation of purchases is not to be understood generally, but only where the purchaser had no son; if he had any, it may be a doubt whether he could alienate any part at this time. Certain it is, he could not the whole, even in Henry the Second's time. For thus Glanville lays down

† Hume, hist. of England, vol. 1.

‡ LL. Hen. I. cap. 70.

down the law : *Si vero questum tantum habuerit, is qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet sed non totum questum, quia non potest filium suum hæredem cohæredare* †.

THE practice of alienating lands by descent grew up more slowly. At this time a part only was alienable, and that not freely, to all persons, or for any consideration generally ; but only in particular cases, first to the church in Frankalmoigne ; secondly, to one who had done services in war, or to the fief in time of peace ; thirdly, for the advancement of his family, as in Frank-marriage with his daughter, sister, niece, or cousin. But every day this liberty gained ground, until at length the interest of the heir entirely vanished, and that of the lord began, in military tenures, to be little considered, and not at all in socage. However, in Magna Charta some check was given to that kind of alienation of the whole fief, that was carried on under the pretence of subinfeudation. *Nullus liber homo det de cætero amplius alicui vel vendat de terra sua quam ut de residuo terræ possit sufficienter fieri domino feudi servitium ei debitum* ; and this sufficiency was by practice explained to the half of the fee ‡.

No provision being made in these laws for the consent of the lords, they generally, though not always, lost their fines ; and a method likewise was invented to obviate their refusal, by levying fines in the king's courts of record, in this manner. They used to suppose that the parties had covenanted to alienate ; and all writs of covenant (being actions of public concern to the justice of the kingdom) were sueable only in the king's court ; and by consequence this covenant to alienate was sueable only there. The superior court then being possessed of the matter, as an *adversary cause*, permitted the parties (on a fine being paid to the king, in lieu of that which he would have received at the end of the suit, from the party that failed) to make an amicable agreement or end of the suit, which was done by the party sued coming in, and recognizing, that is, acknowledging in court the right of the demandant to the land. This method of conveyance by fine grew up, and still continues to be one of the common assurances of the realm. For being transacted in a court of record, it obviated the danger
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† Lib. 7. c. 1.

‡ Glanvil, ut supra. Ruffhead's statutes, vol. 1. p. 8.

of future controversies between parties, or any dispute concerning the execution of a deed, or the giving of livery and seizin †.

AT length the statute of *Quia emptores terrarum*, already mentioned, was made, as well to remedy the mischiefs the lords complained they suffered by subinfeudation, namely, the loss of their fruits of tenure, as to settle the doubt, as to the right of the tenants to alienate. This statute entirely takes away the lords consent; for it gives the tenant free power to sell, or alien the whole, or part of his tenancy, to whom he pleased. But then, in favour of the lord, it establishes, that if the tenant parts with his whole interest in the lands, namely, the fee simple, the *alienée* should not hold of the *alienor*, but immediately from the alienor's lord; by the same services, by which he, the alienor, had holden. Thus were the lords, in one respect secured in their rights, by the stopping the course of subinfeudations, and the tenants got a free liberty of alienation without the consent of the lord, or paying any fine to him. The king, however, not being named expressly in this act, it was construed not to bind him, as I have said before; and his consent was still required to the alienation of his tenants by military service, according to the rule of Magna Charta; that is, if more than half was alienated, so that the residue was deemed insufficient to answer the services. And this was put out of doubt by the statute *De prerogativa regis*, made the 17th of Edward the Second, cap. 6.

THE bent towards free alienation, however, was so strong as to occasion a further mitigation so soon after, as the first year of Edward the Third. For then it was provided, that if the king's military tenant alienated without licence, contrary to the late act, the land so alienated should not be absolutely forfeited as before, but that the king should be contented with a reasonable fine in chancery. These compositions were sometimes dispensed with, to encourage the tenants to attendance in hazardous expeditions; but, except in those singular cases, they continued to be paid, until the reign of Charles the Second, when knight's service being abolished, they fell of course along with it ‡.

SUCH

† Britton, c. 18. Wright on tenures, p. 163. 164.

‡ Staunford, de prerog. Reg. cap. 7.

SUCH was the progress the alienation of land made by conveyance *inter vivos*; but the bequeathing lands by last will did not keep equal pace with it. The first step made thereto was by laying hold of the doctrine of *uses*, which about the time of Richard the Second was invented by the clergy, to elude the statutes of Mortmain, by which their advance from time to time was checked. As in every feudal grant there were two estates, the absolute propriety in the lord, a qualified property, namely, the possession and profits, in the tenant; now that they were prohibited from taking the real tenancy, they cunningly devised a means of subdividing the tenancy, by separating the profits from the possession. When, therefore, a man had a mind to alienate to the church, as he could not do it directly, he infeoffed a person to the use of such a monastery. Here the feoffee and his heirs were, in the construction of the common law, the proprietors, but, in fact, were bare trustees for the monastery, for the use of which they received the profits. But it may be asked, if the trustee or his heirs would not suffer them so to do, where was their remedy. The courts of common law allowed of no such division of estates at that time, nor would they have suffered such necessary laws to be defeated by such collusion, though they had been acquainted with these divided interests. They had recourse, therefore, to chancery, where, it being always, to the time of Henry the Eighth, filled with a churchman, they were sure to meet favour; and this court claiming an equitable power to enforce persons conscientiously to fulfil their engagements, compelled the trustee to support and maintain the uses.

THESE uses, once introduced, were applied to other purposes, particularly to that I am now upon, the enabling persons to dispose of their lands by will. The manner was thus: A. aliens his lands to B. to the use of A. himself for his life, and, after his death, to such uses as he A. should, by his last will and testament, appoint. B. was then compellable in chancery, not only to suffer A. to take the profits during life, but after his death to execute the directions of the will, and to stand subject to the use of such persons as he appointed, and make such estates as he directed. This method gained ground every day, as many persons chose to retain their power of alienation in their own hands, to the last moment of their lives, and to keep their heirs, or other expectants, in continual dependance. And it at length

length grew so common, that in Henry the Eighth's time, it was thought proper to give leave, without going through this round-about method, to dispose of lands directly and immediately by will; of the whole of their socage lands, and of two thirds of the lands holden by knight's service. And this latter tenure being, after the Restoration, turned into common socage, all lands, not particularly restrained by settlement, are since become devisable; whereas, before these laws, they were only so in particular places, by local custom. But the statute that gives this power, in order to prevent frauds, expressly orders such will to be in writing; whence arose a distinction, as to the validity of wills of land, according as these lands had, or had not, been before devisable by custom. For those that were so before, continued devisable by will *nuncupative*, or without writing †.

BUT the reduction of the will into writing was not found sufficient to prevent forgery and perjury, and therefore the statute of frauds and perjuries has added other solemnities, as requisite to pass lands by will. It requires that it shall be signed by the testator, or some other by his direction, and attested by three witnesses in his presence.

As to signing, it is insignificant where the signature is, whether at the bottom, or the top, or in the context of the will, the name of the testator, written by his own hand, in any place, being sufficient. And the putting his seal to the will, though without his writing, has been judged sufficient; for his seal is as much his mark, or sign, as his handwriting. As to the attestation, the statute requires it to be in the testator's presence; but it is absolutely necessary, that he should look on and see it done. Therefore, if it is attested in the room where he lies sick in bed, with his curtains undrawn, this is a good attestation; or if it is attested in a neighbouring room, and the door open, so that he might possibly see it done, this is in his presence. But if the door be shut, or the place so situated that he could not by any means see the attestation, the will is void.

I SHALL next proceed to *involuntary alienation* of lands, namely, for payment of debts; and then give an account of the origin and progress of *estates tail*, which were introduced to restrain this power of alienation, and to restore, in some degree, the old law of keeping estates in the blood of the first purchaser.

LECTURE

† An. 27. Hen. VIII. cap. 10. ap. Ruffhead, vol. 2. p. 226.

LECTURE XVI.

Involuntary alienations of feudal land—Talliage—Edward I. introduces the first involuntary attachment of lands—Statutes enacted for this purpose—Their effects—The origin of estates Tail.

THE involuntary alienation of feudal land, namely, the attaching, and afterwards the selling it for debt, kept pace pretty much, but not strictly, with the voluntary alienation already treated of. It first began in cities and trading boroughs, which were either the remains of old Roman towns, and where, consequently, the estates were allodial; or else new towns, founded either by the kings, or other great lords; or their demesnes, for the benefit of trades and arts within their own districts. External commerce, during those confused times, was little known or practised, the Barbarians of the North infesting the coasts of the ocean, and the Saracens and Moors, those of the Mediterranean. It was the interest, therefore, of every lord who had such a town on his territory, to give it such privileges as would make it flourish, and outrival the towns of like nature on the lands of the king, or the neighbouring lords. For the natives of such towns were no part of the feudal society, but were in the nature of socage tenants in the early times, removeable, and consequently subject to be taxed, or, as our law calls it, *talliagable*, from the French word *tailler* to cut †.

TALLIAGE, consequently, was the cutting out a part from the whole of the tenant's substance, at the will of the lord. Yet this very power of talliage, which the lords were not for a long time inclined to part with, joined to their desire to make their towns flourish (that they might be able to bear a greater talliage) put them under a necessity of making such provisions, and granting such privileges, as were necessary for the use of trade and commerce, and at length, in effect, destroyed that absolute power of taxation, which the king and lords had all along claimed and exercised, and which at

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† Madox, hist. of Exchequer, ch. 17. *Firma burgi*.

first, for their own interests sake (which no doubt they well understood) they had used with great moderation. But after the discovery of the civil law at Amalfi in Italy, in the reign of our Stephen, the kings of Europe, who found therein an unlimited power of taxation in the emperor, were desirous to establish the like authority in themselves; and for that purpose began with oppressing their nobles with arbitrary scutages, or commutations for military services; and the towns of their demesne with talliages, not only arbitrary, but extravagantly beyond their power to pay without ruin †.

JOHN of England was particularly famous for these extraordinary charges; for though his title to the crown was, at that time, by many of his subjects, and by others abroad, much doubted (as in prejudice of his elder brother's son Arthur then a minor) and his only just claim could be but by parliamentary authority, the omnipotence of which was not then so universally admitted, never was there a prince who carried his prerogative to such extravagant and oppressive heights. This, at length, occasioned the making *Magna Charta*; partly to assert and restore the ancient liberties of the nation, which had been invaded; partly to alter the old law, in such particulars as had been the engines of oppression. One of the chief of these latter remedies was the taking away the right of talliage, unless consented to in parliament. And now were the boroughs emancipated, and the burghesses made freemen, which before they could hardly be called, while their effects lay wholly at the mercy of the lord ‡.

IN the next reign they advanced in importance; for as the treasure of the kingdom was in their hands, they were sure to be favoured and courted on both sides, during the fierce contests between the king and the barons. And in the latter end of this reign it appears they had got admission into parliament, which not a little increased their consequence. Edward the First was a great favourer of merchants, and, for the security of their debts, introduced the first involuntary attachment of lands by the act called *statute merchant*, in the thirteenth year of his reign ||.

BEFORE

† Du Cange, et Spelman, voc. Tallagium. Madox, antiq. of the Exchequer, ch. 17.

‡ Hume's hist. of England, appendix 2. Madox, Firma burgi, ch. 1.

|| Ruff head, vol. 1. p. 115.

BEFORE this time, no lands, except in boroughs by custom, were attachable for debt, but only in the case of the king, who, by right of his prerogative, could enter on the lands of his debtor, and receive the profits, until he was paid. For the same political reason, the surety also for a debt to the king, if he paid the debt, was allowed to come in the king's place, and enjoy the same privilege; but in all other cases, the chattles were the only mark for the debt. This statute, after reciting that merchants had fallen into poverty, for want of a speedy remedy for recovering their dues, provides, that, in every city or great town, which the king should appoint, there should be kept a *recognizance*, that is, the acknowledgement or confession of debts due to merchants, and of the day of payment; and that, in case payment was not made at the day, they may, or should, on the application of the merchant, and inspection of the roll, imprison the body of the debtor until payment; and if no payment was made within three months, (which time the debtor was allowed to sell his chattles or lands) his chattles and lands were to be delivered to the merchant creditor, at a reasonable valuation, or *extent*, as it is called; that out of the profits he might satisfy himself. And in case the debtor could not be found within the jurisdiction of the city or town, or had no chattles or lands therein, then was the mayor to send into chancery the recognizance of the debt, and the chancellor was to issue a writ to the sheriff in whose bailiwick the debtor was or had effects, to act in like manner. And so greatly was the merchant favoured, that tho' this was but an estate for years (it being certain, from the valuation, in what time the debt would be paid), yet had he, with regard of maintaining actions to recover his possession when deprived of it, the privileges of a free-holder given him, by express provision in the act. Such was the favour shewn to merchants to recover their just demands, nor were other creditors at this time left totally unprovided for, in cases where there was a deficiency of chattles.

IN the same year a law was made for attaching the lands of persons, in favour of creditors who were not merchants, but in a different manner, called an *elegit*. I shall here use the words of the statute, as they are sufficiently plain, and easy to be understood. "When debt is recovered or acknowledged
" in the king's courts, or damages awarded, it shall be, from henceforth, in
" the election of him that sueth for such debt or damages, to have a writ to
" the sheriff of *feri faciat* of the lands and goods" (which was the old re-

medy against the chattles) “ or that the sheriff shall deliver to him all the
 “ chattles of the debtor, saving only his oxen and beasts of his plough,
 “ and the one half of his land, until the debt be levied upon a reasonable
 “ price or extent.” After this the act gives the same privilege as in case
 of statute merchant, to the creditor dispossessed. From his making his
 election for the extending the lands, the writ directed to the sheriff for
 that purpose got the name of *elegit*. The difference of execution just men-
 tioned shews clearly in how superior a light the legislature regarded the inte-
 rests of commerce. That the debts to merchants, in whose prosperity the
 whole community was concerned, might be levied as soon as possible, the
 security by statute merchant gave possession of the whole of the land to the
 creditor; but the writ of *elegit* gave him possession of no more than one half.
 Originally men could not alien lands at all. Afterwards they were allowed
 to alien, but not beyond the half of the fief; and this principle or maxim
 was strongly regarded at the time the writ of *elegit* was framed, which was
 before the statute of *Quia emptores terrarum*, which allowed alienation of
 the whole. So that whatever stretches might be found necessary, from the
 circumstances of merchandize, yet, with regard to the kingdom in general,
 a small deviation only was made from the common law, and the *elegit* was
 allowed to affect no more by operation of law than a man was supposed
 capable of alienating by his own deed †.

Two reigns after, namely, the 27th of Edward the Third, when the mart,
 or market of the standing commodities of England, namely, wool, woolfels,
 hides, lead and tin, was removed from Flanders into England, and a court
 merchant was erected in all such places where the staple was fixed, to be
 held by the mayor of the staple, he had power given him to take recognizances
 on the debts contracted at the staple, called *statute staple*, in the same
 manner as of *statute merchant*; and as the effect thereof was the same as of
 statute merchant, it need not be particularly repeated. However in some
 time afterwards, statute merchant was, by custom, extended to others beside
 merchants, and became one of the common assurances of the realm. The
 statute staple was likewise extended upon surmise of the debt being con-
 tracted at the staple; and though an act of Henry the Eighth in England re-
 strained this latter to its ancient bounds, yet, the same act framed a new kind
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† An. 13, Ed. I. c. 18. apud Ruff head, append.

of security in imitation of it, common to all the subjects, called a recognizance on that act, which had all the effects and advantages of it †.

THE statutes of Elizabeth and those since her time, concerning bankrupt, have gone much further. They not only, in the cases they extend to, laid the whole land open to the creditor, but, instead of a possession, and gradual discharge of the debt, which was all that was given by the statute merchant, *elegit*, or statute staple, they gave him a more speedy satisfaction, by enabling him to procure a sale of the lands ‡. But these later acts having never been enacted in this kingdom, I shall content myself with having barely hinted at them, and their effects.

VOLUNTARY alienations of land having gained ground, and become at length established in England, contrary to the principles of the original law; and it being allowed for a maxim, that he that had a fee simple, had an absolute dominion over half of his land, to dispose of as he pleased, and, in some cases, of the whole; it could not be, but that there would arise many persons fond of perpetuating their estates in their families, and consequently displeased at this power of alienation. The means they used to attain their ends was under that maxim of law, *Tenor investituræ est inspiciendus*, or, as we express it, *Conventio vincit & dat modum donationi*. Every man therefore, absolute master of his estate, having a right to give it on what terms he pleased, they began, not as before, to give lands to a man and his heirs in general, for that would have given an absolute dominion, but to heirs limited, as to the *heirs of his body*, or to the *heirs male* of his body, or to the heirs of his body by such a woman. Here it was plain enough, that none were intended to take, but such as came within this description; and by this means they hoped to defeat the power of alienation, to secure the estate to the persons described, and, in failure of them, the returning or reversion of it to themselves or their heirs.

BUT the judges complying with the universal bent of the times to the contrary, did not give these grants that construction they expected, upon the natural presumption, that every person will have heirs of his body, and that

† An. 23. Henry VIII. cap. 6. ap. Ruffhead, vol. 2. p. 167.

‡ An. 13. Eliz. c. 7. An. 1. James I. cap. 15. 21. James I. cap. 19. 5. George II. c. 30.

that his posterity will continue for ever. They construed this to be a fee simple; and yet, not entirely to disregard the intention of the donor, to be a fee simple conditional; as if the words had been *to a man and his heirs*, provided he have heirs of his body, and consequently to be alienable, and forfeitable upon a certain event. And one great reason of making this construction, I take to be the consideration of forfeiture for treason and felony, which, by such grants, would be defeated by another construction, and men thereby rendered more fearless to commit crimes in those troublesome times †.

LET us see then what estate or power was in *donor* and *donée* immediately by the grant; and what, upon the performance of the condition, namely, the having issue. And first, the *donée* had immediately a fee simple upon the grant, contrary to Britton's opinion, that, before children born, he had only an estate for life, and afterwards a fee. This appears from hence, that if a man had aliened in fee before issue had, the donor could not have entered upon the lands for the forfeiture, which, if he was tenant for life, he might. For the alienation in fee of tenant for life is an absolute forfeiture, and gives right of entry to the *lessor*. The *donée*, then, having presently a fee simple in him, that is, an estate for ever, than which there can be no greater; it was impossible the donor should have any actual estate or interest in the lands. He had not, therefore, a *reversion* vested in him, that is, a certain positive right of the lands returning to him or his heirs, as he would have had, if an estate for life only had been granted. He had only a bare *possibility of reverting*, in case the *donée* died without issue; or, leaving any, that issue had failed.

FOR the same reason, of the *donée*'s having a fee simple, no *remainder* could be limited in such an estate. If land be given to A. for life or for years, and after the efflux of the life or years to B, B. hath presently a remainder in the lands for life, years, or in fee, according as the limitation of the estate is; because it is certain that a life, or term of years, must expire. But if land be given to A. and the heirs of his body, and, in failure of such heirs, to B. and his heirs, this remainder to B, before the statute *De Donis*, was void, for A. had immediately an estate for ever, and therefore the

† Coke on Littleton, book 1. chap. 2. § 13.

the limitation over to B. was rejected, as repugnant to the estate it depended upon.

BUT though, by such a grant, the donée got a fee, it being clogged with a condition, he had not, to all intents and purposes, an absolute power over it, either with respect to the donor, or his own issue. If the donor aliened before issue had, this was no bar to the donor, of his possibility of *reverter*; but it was a bar to the issue born afterwards, to enjoy the estate tail. For at this time fathers had a greater liberty to bar their children, than a stranger. Therefore, in this case, the *alienée* and his heirs, were to enjoy the lands while the donée, or any issue of his body remained. But whenever they failed, the donor's, or his heir's possibility of *reverter*, was changed into an actual reversion, and the land became his. For now, by a subsequent event, it appeared, that the legal presumption of the estates continuing for ever was ill founded. Neither, by the having of issue, was the condition performed to all purposes, so as to vest an absolute fee in the *donor*; for if the donée had died without issue, or if his issue failed, without any alienation being made by either, in this case also, the donor's possibility was changed into an actual reversion. But by having issue, the condition was so far performed, as to enlarge the power of the donée to three special purposes; first, to alien absolutely, and thereby to destroy the right of issue, and the possibility also of *reverter* in the donor; secondly, to charge and incumber it to the prejudice of both issue and donor; and thirdly, to forfeit it for treason or felony, to the prejudice of both also. Such was the construction the judges made of these grants, which, we see, gave, in almost all cases, an unlimited power of alienating, contrary to the intention of the donor, and the form of the gift†.

BUT, in the thirteenth of Edward the First, the lords, willing to preserve the grandeur of their families, obtained of that monarch the famous statute of Westminster the second, called *De Donis*, which by these words, *quod voluntas donatoris, secundum formam in charta Doni sui, manifeste expressam, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post eorum obitum,*

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† Wright on tenures, p. 186. et seq.

vel ad donatorem vel ad ejus heredem, si exitus deficiat, revertatur†, created a new kind of inheritance, *estates tail*, which very much resemble the old feudal donations, that were only descendible to the issue of the first feudatary. Let us see the consequence of these words. First, since the will of the donor was to be observed, it followed, that neither the donée, nor his issue, should have power to alien, incumber, or forfeit: the consequence of which was, that he could no longer have a fee simple, as these are inseparable incidents to such an estate; but a lesser estate, called *Fee tail*, from the French word *Tailler* before mentioned, as being, like other lesser estates, carved out of the fee simple.

WERE it to be asked, in whom did the fee simple reside? it is plain it could be in none other but the donor, who had it originally in him. Therefore, by this statute, the possibility of reverter, which the donor had, was changed into an actual present interest, called a *reversion in fee simple*. But it was not always necessary that the fee simple should be in the donor; for estates tail, being now less than a fee simple, it became possible to limit a remainder thereon which should be good: Thus, if a gift be made to A. and the heirs of his body, and, in failure of such heirs, to B. and his heirs; in this case, there is no reversion: for the donor hath parted with his whole estate, but A. hath an estate tail, and B. a remainder in fee simple. Many remainders may be limited on one another, as for instance, an estate may be given to A. for years, remainder to B. for life, remainder to C. in tail, remainder to D. in tail, remainder to E. in fee simple; but if the last remainder is not in fee simple, but in fee tail, then is the reversion in fee simple to the donor.

HOWEVER, although a tenant in tail after this statute could alien only for his own life, his heir in tail was not allowed to enter upon the alienée without first proving his right in a court of law, and this is what is meant by saying, *though a tenant in tail could not destroy the estate tail by his alienation, yet he could continue it*. The reason of this is, that all estates of inheritance are presumed fee simple, until the contrary is proved, and it would be unjust to remove a possessor, who came in by a title apparently fair, until the weakness of that title appears judicially. This rule, however, extended only

† Coke's institutes, part 2. p. 332. Ruffhead, vol. 1. p. 79.

only to estates corporeal, that lay in livery, not to incorporeal ones, that lay in grant; which shews that this maxim of its working a discontinuance proceeded from the feudal principle, of protecting the possessor, because he was to do the feudal duties.

THE statute to guard these inheritances from alienations, expressly provides, that even a fine levied of them in the king's courts of record should be *ipso jure* null.

THE method of recovering such lands so discontinued, is by a writ called a *Formedon*, from the words *forma doni*, of which writ there are three kinds, according to the title of the persons who bring them; *formedon, in the reverter, in the descender, and in the remainder*. *Formedon in the reverter* lies for the donor or his heirs, and lay at the common law after the failure of issue, where the alienation was before issue had; but since the statute, upon the failure of issue, it lies, though the alienation be after. *Formedon in descender* lies for the issue in tail, when the ancestor has aliened, and is given by the statute. The form of it is as follows, “The king to the sheriff of——greeting, command A. that he justly, and without delay, restore to B. such a manor, &c. which C. gave to D, and the heirs of his body, and which, after the death of the said D, ought to descend to the said B. the son of the said D. by the form of the aforesaid gift, as he says.” *Formedon in remainder* lies for a remainder man in tail, or his issue, after the particular estate previous to his (whether it be for years, life, or in tail) is spent. In the reverter, instead of the word *descend*, it is *revert*; in the remainder, *remain*†.

HAVING shewn the origin of estates tail, I shall next consider their consequences, and future fortune.

† Coke's institutes, part 2. p. 336.

LECTURE XVII.

The consequences and history of estates Tail.

THE following are the words of my lord Coke. “ When all estates “ were fee simple, then were purchasers sure of their purchases, “ farmers of their leases, creditors of their debts; the king and lords had “ their escheats, forfeitures, wardships, and other profits of their feignories: “ and for these, and other like cases, by the wisdom of the common law, all “ estates of inheritance were fee simple; and what contentions and mis- “ chiefs have crept into the quiet of the law by these fettered inheritances, “ daily experience teacheth us.” By this enumeration of his, of the advantages that attended estates of fee simple, it is easy to see who were the sufferers, and wherein they suffered, by the introduction of estates tail. But it is a little surprizing that he should make such a slip as to say, that before this creditors were secure of their debts by all estates being fee simple; when the first statute that gave them any hold of lands was made after this statute *De Donis*, in the latter end of the same year of the king’s reign, the thirteenth of Edward the First. Those, indeed, who had landed estates at that time, and their posterity, were great gainers hereby; but the king and the nation in general were sufferers. The nation suffered by the check that commerce, then just arising, received, by so much lands becoming unalienable, and the crown suffered in a double respect; first by the opportunity it afforded to strengthen and explain the great estates of the lords, and secondly by the security it gave when enlarged.

Soon after the conquest, the estates of the English lords were enormous. William brought over an army of 60,000 men, not levied by himself, (for he was unable to raise or defray the expences of a third of that number, out of the province of Normandy,) but consisting chiefly of adventurers, who engaged in the expedition on the promise of forfeited lands, in proportion to the numbers they brought with them. Accordingly, some had seven hundred

hundred manors, others five, four, three, two, one hundred, or less; in-
somuch, that all the lands of England, (if we except the king's demesnes,
the church lands, and the little properties annexed to cities and boroughs)
were in no more than about seven hundred hands, the principal of which
were petty princes, like the dukes and counts of France†.

WILLIAM was sensible, from the experience of that country, how dange-
rous such large grants would prove to the authority of the crown, and he
accordingly moderated them as well as his circumstances would permit.
That the king might not be too far removed from the view of the lower
people, by the interposition of the great lords, their immediate superiors,
he did not, as in France, leave the whole judicial power, and the profits of
the county courts in the earls; but justice was administered in the king's
name by his sheriffs; who, as being deputies of the earls, were called *Vice
Comites*, and who accounted for the profits to the king, except as for the
one third, which in England was the earl's proportion; and in after times,
upon new creations, the third also was referred to the king, and only a cer-
tain stipend out of it, generally twenty pounds a year, assigned to the earl‡.

ANOTHER means he used of disarming them of the too great powers im-
moderate estates would have given them, was avoiding the rock the French
court had split on, the giving vast territories, lying contiguous to each
other, in fief, whereby all the followers were immediately in the view and at
the call of the lords. William acted more prudently. He generally gave to
an earl twenty knights fees, which was the proportion of an English earldom
in the county, whose title he bore; perhaps thirteen, or a barony, in another
county; and the remainder, he was to give, either in baronies in distant
counties, or more generally in single knights fees, dispersed through all En-
gland. This was his general method, except to a few of his near relations,
to whom he gave palatinates with *jura regalia*, which were exactly in the na-
ture of the French duchies and counties||.

ANOTHER prudent step he took for the benefit of his successors, was the
making all his grants *feminine fiefs*. For as, in a course of several descents,

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† Hume's hist. of England, vol. 1. Carte's hist. 382, 383, 384, 420. Brady's hist.
append.

‡ Selden, tit. hon. part 2. chap. 5. § 3.

|| Ibid. § 8. and 9.

it must happen that lineal males would frequently fail, by admitting the daughters in that case, these vast inheritances were frequently broken, as females succeeded equally. His successors followed his plan, and for that purpose, not only permitted, but encouraged their great vassals to alien, and dismember their properties; and whenever a great escheat fell, were always sure, unless there was a prince of the blood to be provided for, to divide it into many hands.

BOTH kings and people received the advantages, and would have received more, if this policy had continued. The immediate tenants of the crown being encreased in number, and lessened in wealth, were not able to confederate so easily against the crown; and, sensible of their being weakened, had occasion for the support of the lower rank of the people, whom, consequently, they treated with more gentleness and equality than before. But this statute of entails put a stop to the progress that course of things were in; estates became unalienable, and indivisible. The property of no lord could lessen; and if it happened, as it frequently did, that they acquired, either by descent or marriage, or the purchase of an estate not tied up, a new entail connected it inseparately with the old one; and thus the lords, towards the end of the Plantagenet line, grew up to such a pitch of power, as was dangerous to the constitution, and when they were divided into the factions of the York and Lancaster, deluged the land with blood.

THE king saw the mischief betimes, but the mischief was done. The act was passed, and to get it repealed was impossible. They had nothing left, but to find means to elude it by construction of law, wherever they could. The scheme was readily embraced by the judges and lawyers, who had raised great outcries against these fettered inheritances, and were joined by all the trading and industrious people, and even by the younger branches of these great families, whose fathers were thereby disabled to provide for them.

THE first means found out was by *collateral warranty*. Before this statute all warranties by an ancestor bound the heir at law, although no land descended from that ancestor, upon the presumption that no man would disinherit his heir, without leaving him a recompence. But this could be no longer

longer the law in general ; for, if so, the ancestor in tail might, by his warranty, defeat the tail, contrary to the statute, which says, *The will of the donor shall be observed*. They therefore made now a distinction between a *lineal* warranty and a *collateral* one. Lineal warranty is that which is made by tenants in tail ; collateral, that which is made by one who is a stranger to the entail. In the first case they held it no bar, unless assets descended ; that is, an estate in fee simple, equal in value. But in the latter case, that no assets descended, they held it at bar as at common law†.

To illustrate this by an example, If lands are given to A. and the heirs male of his body, and A. aliens with warranty, this is lineal warranty, and shall not bind the son ; but if B. the brother of A. who has nothing to say to the entail, joins in the alienation with warranty, or releases to the alienee with warranty, or disseizes A, and then aliens with warranty, and dies without issue, so that A's son is his heir, this warranty is collateral to the entail, and without assets should bind the son of A, as at common law. At first view it may seem surprising how this construction gained ground against the express words of the statute, *Voluntas donatoris de cetero observetur* ; for the will of the donor was certainly as much defeated by a collateral, as by a lineal warranty ; but the judges took advantage of the preamble of the act, which, reciting the mischief, speaks only of the alienation of the tenant in tail, that is, of lineal warranty. They restrained, therefore, out of disfavour to these fettered estates, the general words in the enacting part, to the particular case mentioned in the preamble, on this ground, that the common law was not to be altered without it appeared undeniable that the legislator intended it ; and here, as to collateral alienation, they are silent. This was the first device used to defeat estates tail, namely, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation, and to bind himself and heirs to warranty ; which was generally obtained for a small consideration, as such person could never be a gainer by the estate tail, since it could in no case come to him.

WHEN once this rule of collateral warranty barring an estate tail, was settled, attempts were made to prevent its taking effect, and to continue such estate notwithstanding. Jude Richel, in Richard the Second's time, led

† Coke on Littleton, lib. 3. chap. 13. § 703, 709.

led the way ; he having fettled lands on his eldest fon in tail ; remainder to his second fon in tail ; adds, that the lands are given on this condition, that, if the eldest fon should alien, that instant his estate should cease and determine, and the land remain to the second fon and the heirs of his body. Here he imagined he had got clear of collateral warranty, because the first estate was to determine, and the second to commence immediately on the alienation, and before any collateral warranty could descend on the second. But the judges determined this condition to be void ; for which Littleton gives three reasons, drawn rather from the art of law, than from the principles of plain reason†. The true ground seems to be this :

IN every reign, from Edward the First down to Edward the Fourth, bills were brought into parliament to repeal the statute *De Donis*, as Coke informs us, but had constantly miscarried, as the estates of the majority in parliament were entailed. The only relief found out at that time against their mischiefs was this collateral warranty ; and if Richel's conditions were to be adjudged good, all estates tail would have been made with such conditions, and there would have been an end of that method of defeating them. The same was the fate of a similar settlement of Judge Thirning, who took the advice of his cotemporary judges, in wording his condition so as to make it effectual ; but their successors were of a different opinion, and rejected it. However, these collateral warranties not being to be got in all cases, the relief was but partial, and extended only to particular cases. And the tenant in tail himself could by no act of his, in concurrence with any other person, except a collateral ancestor of the issue in tail, bar them.

AT length the judges found out a device, by a fiction in law, to enable him to bar his issue, and all remainders, and reversions. A. brings his action real against B, tenant in tail, and alledges the lands in tail to be his A's right and inheritance, when in truth he hath no title thereto ; B. comes in, and voucheth C. to warranty, who enters into warranty, and after, when he should defend, makes default, so judgment is given for A. against B. and for B. to recover in value against C. Here, though C. has no land to render in value, the judges have construed B, and all that should come after

† Lib. 3. chap. 13. § 720.

after him, to be barred; because if C. ever after purchased lands, these lands might be recovered from him, by virtue of the former judgment; and so there was a possibility of a recompence. Though this decision at first created great outcries, and even in Henry the Eighth's reign was but weakly defended in equity and conscience, by the author of *Doctor and Student*, yet the judges, for the public good, constantly adhering to it, and these common recoveries being taken notice of and approved of by subsequent acts of parliament, are at length grown to be common assurances of lands, and, passing in the court of record, are the best securities of estates †.

THE bearing of estates tail, by *fine* passed in the king's courts, grew up another way, and is founded on an act of parliament in Henry the Seventh's reign, and is indeed, properly speaking, a partial repeal of the statute *De Donis*, since it puts it in the tenant in tail's power to destroy it, by observing certain solemnities. Though common recoveries had been invented some years before, yet as they had not had time to grow up to such a degree of firmness as to be sufficiently depended upon, their legality was still doubted, and it was not certain that future judges would give them the same construction which their predecessors had done. Therefore, that politic prince Henry the Seventh, who saw, in all its lights, that superiority which the preservation of landed property in their families gave to the nobles, a superiority which had cost some of his predecessors their lives and crowns, freed lawyers from the trouble of inventing future devices against entails, by getting the famous act passed in the fourth year of his reign, which made a fine, with proclamations to conclude all persons, strangers as well as privies ‡.

It was the purport of, and so it is expressed in the statute *De Donis*, that a fine levied of entailed lands should be *ipso jure* null, and it is the intent of this act, on the contrary, that a fine, levied with the prescribed solemnity, should be valid to bar the persons therein intended to be barred. There is a clause, indeed, in this act, saving the right and interests of all persons, which accrued after the ingrossing of the fine, they pursuing their rights within

† Saintgerman, cap. 50.

‡ Bacon, voc. Fine and Recovery. An. 4. Hen. VII. c. 24. ap. Ruffhead, vol. 2. p. 79.

within a certain time after they accrued. This clause was apparently thrown in to make the act pass, and to deceive the enactors into an opinion, that it would not affect estates tail; and on this clause a doubt occurred in that reign, whether the issue of tenant in tail could be barred by this statute, and that, notwithstanding by the tenor of it, privies were barred. The question was, whether the statute meant privies to the fine, or privies to the estate of the person levying it? The issue were not privies in the first sense, but were in the latter. The judges embraced the opportunity this ambiguity gave them, of defeating entails, and bound the issue by the fine. A statute of the succeeding prince approved of that construction, gave it retrospect, and prevented all ambiguity for the future †.

Thus were estates tail no longer certain perpetuities, but defeasible upon performing certain requisite solemnities. Still however they continued not to be forfeitable for crimes, which was a point not to be got over without an act of parliament, and there was little likelihood of obtaining such an one; but Henry the Eighth snatched the lucky opportunity his situation gave him, of gaining this important point, in the 26th year of his reign, when he had quarrelled with the Pope, and all hope of accommodation vanished; when a sentence of excommunication was denounced against him, and numbers of his subjects, many of them of great fortunes, bigotedly attached to the old religion, were known to meditate rebellion. The parliament, the majority of which were of the new profession, seeing no other means to preserve the security of the state, and the protestant religion, yielded at length to the passing of an act for that purpose ‡.

HOWEVER, there were not wanting persons after this, willing to create perpetuities, in which they were always disappointed by the decision of the judges. The first device was by giving estates upon condition, that if tenants in tail should levy a fine, or suffer a recovery, the estate should cease, and go over to the next issue intitled. But the judges rejected such condition, for the same reason as in Richel's case. They adjudged the right of barring by a fine or recovery to be an incident inseparable to a fee tail, and all

† An. 32. Hen. VIII. c. 36. ap. Ruffhead, vol. 2. p. 296.

‡ Ruffhead, vol. 2. p. 216.

all conditions repugnant thereto idle and void; for how could the law suffer that an estate, by previous act of the donor, should, upon a judgment at law, become vested in any other person than him who recovered? These ingenious conveyancers, finding that the limitation upon breach of the condition came too late, as the estate had already gone in another channel, framed the condition thus; that *if tenant in tail should go about to levy, &c. or make any covenant to levy, or hold any communication about levying, &c. the estate should then, &c.* But these were all condemned upon the old principle, and still more for their vagueness and uncertainty.

Y L E C T U R E

LECTURE XVIII.

*The constitution of a feudal monarchy—The dignity and revenues of the King—
An examination of his power as to the raising of taxes and subsidies.*

AS, in my former lectures, I drew a general sketch of the nature and form of the governments that prevailed among the northern nations whilst they remained in Germany, and what alterations ensued on their being removed within the limits of the Roman empire, it will be now proper to shew, in as brief a manner as may consist with clearness, the nature and constitution of a feudal monarchy, when estates were become hereditary, the several constituent parts thereof, and what were the chief of the peculiar rights and privileges of each part. This research will be of use, not only to understand our present constitution, which is derived from thence, but to make us admire and esteem it, when we compare it with that which was its original, and observe the many improvements it has undergone. From hence, likewise, may be determined that famous question, whether our kings were originally absolute, and all our privileges only concessions of theirs; or whether the chief of them are not originally inherent rights, and coeval with the monarchy; not, indeed, in all the subjects, for that, in old times, was not the case, but in all that were *freemen*, and, as all are such now, do consequently belong to all.

To begin with the king, the head of the political body. His dignity and power were great, but not absolute and unlimited. Indeed, it was impossible, in the nature of things, even if it had been declared so by law, that it could have continued in that state, when he had no standing force, and the sword was in the hand of the people. And yet it must be owned his dignity was so high, as to give a superficial observer some room, if he is partially inclined, to lean to that opinion. All the lands in his dominions were holden of him. For, by degrees, the *allodia* had been changed into, and supposed to have been derived from, his original grant, and consequently revertible to him. But then, the land proprietors had (on fulfilling the conditions

conditions they were bound to) a secure and permanent interest in their possessions. He could neither take them away at pleasure, nor lay taxes or talliages on them by arbitrary will, which would have been little different. Since, in Magna Charta, we find the people insisting that the king had no right to assess the quantity of escuage, which was a pecuniary commutation for military service, nor to lay talliages on his other subjects, but that both must be done in parliament. He was a necessary party to the making new laws, and to the changing and abrogating old ones; and from him they received their binding force, insomuch that many old laws, tho' passed in parliament, run in the king's name only. For, in those days, persons were more attentive to substance than forms; and it was not then even suspected, in any nation of Europe, that any king would arrogate to himself a power so inconsistent with the original freedom of the German nations. Nay, in France, to this day, the king's edicts are not laws, until registered in parliament, which implies the consent of the people, tho' that consent is too often extorted by the violent power that monarch has assumed over the persons and liberty of the members of that body †.

THE dignity of the king was supported, in the eyes of the people, not only by the splendor of his royalty, but by the lowly reverence paid him by the greatest of his lords. At solemn feasts they waited on him on the knee, or did other menial offices about his person, as their tenures required, and did their homage and fealty with the same lowly and humiliating circumstances that the meanest of their vassals paid to them. His person likewise was sacred, and guarded by the law, which inflicted the most horrible punishment for attempts against him; neither was he to be resisted, or accountable for any private injury done personally by himself, on any account whatsoever. For the state thought it better to suffer a few personal wrongs to individuals, than to endanger the safety of the whole, by rendering the head insecure.

BUT the greatest of the kingly power consisted in his being entirely entrusted with the executive part of the government, both at home and abroad. At home justice was administered in his name, and by officers of his ap-
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pointment.

† Hottoman. Franco-Gall. Boulainvilliers on the antient parliaments of France.

Fortescue de laud. leg. Angl. cap. 34. 36.

pointment. He had, likewise, the disposal of all the great offices of the state, with an exception of such as had been granted by his predecessors in fee, and of all other offices and employments exercised in the kingdom immediately under him. Abroad he made war and peace, treaties, and truces as he pleased. He led his armies in person, or appointed commanders; and exercised, in time of war, that absolute power over his armies that is essential to their preservation and discipline. But how was he enabled to support the expence of the government, or to provide for the defence of the kingdom, or carry on a foreign war; since, if he was not furnished in that respect, these high-sounding prerogatives had been but empty names, and the state might have perished? and if he could at pleasure levy the necessary sums, he being sole judge of the necessity, both as to occasion and quantity, as Charles the First claimed in the case of ship-money, the state of the subject was precarious, and the king would have been as absolute a monarch as the present king of France or Spain †.

BUT abundant provision was made on this head, and that without overburdening the subject, for supporting the ordinary expences of the government. A vast demesne was set apart to the king, amounting, in England, to one thousand four hundred and twenty-two manors, as also many other lands, which had not been erected into manors. Besides these, he had the profits of all his feudal tenures, his worships, marriages, and reliefs; the benefit of escheats, either upon failure of heirs or forfeiture; the goods of felons and traitors; the profits of his courts of justice; besides many other casualties, which amounted to an immense revenue; insomuch, that, we are informed, that William the Conqueror had L. 1061 : 108. a-day, that is, allowing for the comparative value of money, near four millions a-year; so that Fortescue might well say, that, originally, the king of England was the richest king in Europe. Such a sum was not only sufficient for the occasions of peace, but out of it he might spare considerably for the exigencies of war ‡.

THIS revenue, however great, was not sufficient to support a war of any importance and continuance, besides the extraordinary expence of government.

† Craig, de feud. lib. 1. dieges. 16. Du Cange voc. Dominicum.

‡ Madox, hist. Excheq. Carte's hist. of England, vol. 1. p. 423.

ment. It remains, therefore, to see what provision this constitution made, in addition to what the monarch might spare, for the defence of England, as it might be attacked either by land or sea. For the former, every seaport was, in proportion to its ability, obliged to find, in time of danger, at their own expence, one or more ships properly furnished with men and arms; which, joined to such other ships as the king hired, were, in general, an overmatch for the invaders. But if the enemy had got footing in the country, the defence at land was by the knights or military tenants, who were obliged to serve on horseback in any part of England; and by the socage tenants, or infantry, who, in case of invasion, were likewise obliged to serve, but not out of their own country, unless they themselves pleased, and then they were paid by the king.

WITH respect to carrying on *offensive* war into the enemy's country, the king of England had great advantages over any other feudal monarch. In the other feudal kingdoms the military vassals were not obliged to serve in any offensive war, unless it was just, the determination of which point was in themselves; but William the Conqueror obliged all to whom he gave tenures to serve him *ubicunque*; and though he had not above three hundred, if so many, immediate military tenants under him, yet these were obliged, on all occasions, to furnish sixty thousand knights compleatly equipped, and ready to serve forty days at their own expence. If he wanted their service longer, he was obliged to obtain it on what terms he could. There is, therefore, no reason to wonder that the king of England, though master of so comparatively small a territory, was, in general, an overmatch, in those early times, for the power of France. As for *infantry* in his foreign wars, he had none obliged to attend him. Those he had were socage tenants, whose services were certain; so that he was obliged to engage, and pay them, as hired foldiers. As the socage tenants in his dominions had a good share of property, and enjoyed it without oppression, it is no wonder the English archers in those days had a gallant spirit, and were as redoubtable as the English infantry is at present.

To support these military tenants, who served after the necessary time, and likewise his infantry (as the surplus of his ordinary revenue would not suffice) he had *customs* and *talliaes*, and *aids* and *subsidies* granted by parliament. These customs, or so-much paid by merchants on the exportation
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of goods, were of two kinds; as paid either by *merchant strangers*, or by *merchant denizens* †.

THE customs paid by merchant strangers were not originally settled by act of parliament, but by a compact between the merchant strangers and king Edward the First. In the Saxon times the king had a power of excluding strangers from his kingdom, not merely with an intention of inducing their own people to traffick, but chiefly to keep out the Danes, who were the masters of the sea; lest, under pretence of trade, they might get footing in, and become acquainted with the state of the kingdom. They were, accordingly, admitted by the kings upon such terms as the latter were pleased to impose; but Edward, who had the success and prosperity of his kingdom at heart, came to a perpetual composition with them; gave them several privileges, and they gave to him certain customs in return. What shews they had their origin from consent is, that the king could not raise them without applying to parliament. The customs of natives or denizens were, certainly, first given to the king by parliament; though this has been denied by some, merely because no such act is to be found, as if many of the antient acts had not been lost; but there are acts and charters still extant, which expressly say they were appointed and granted by parliament, without the power of which they could not be either altered or enlarged.

THE difference between the customs and the other aids I have mentioned, *viz.* talliages and subsidies, is, that the latter were occasional, granted only on particular emergencies, whereas the *customs* were for ever. If it be asked how they came to be granted in that manner, we must refer back to the original state of boroughs and their inhabitants, traders, in the feudal law. In France, the Roman towns were taken into protection, and had their antient privileges allowed them; but in the series of wars that happened in that country for ages, every one of them in their turns were stormed, and reduced to vassalage, either to the king or some other great lord; and as, now, these lords had learned that the Roman emperor laid on taxes at his pleasure, it was but natural they should claim the same right, especially over towns they had taken in war. The burgesses, therefore, be-
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† Carte, *ibid.* Hume, *append.* 2. Madox, *antiq. of the Excheq.* *passim.*

came in the nature of villains, not indeed of common villains, for that would absolutely have destroyed trade, but with respect to arbitrary taxation, which, however, if the lord was wise, was never exorbitant. In England, I apprehend, they became villains; for the Saxons were a murdering race, and extirpated the old inhabitants. However, wise kings, considering the advantages of commerce, by degrees, bestowed privileges on certain places, in order to render them flourishing and wealthy; and at length, about the time of Magna Charta, or before, when every uncertain service was varying to a certainty, this privilege was obtained for merchant adventurers. But the other burgeses, that did not import or export, and likewise villains, were still talliageable at will. This was restrained by Magna Charta, which declares all talliages unlawful, unless ordained by parliament †.

To come to the latter head, whether taxes, aids, and subsidies can be assessed by the king, as sole judge of the occasion, and the *quantum* — or whether they must be granted by parliament, was the great and principal contest between the two first princes of the unfortunate house of Stuart and their people, and which, concurring with other causes, cost the last of them his life and throne. To say nothing of the divine hereditary right urged on the king's behalf, and which, if examined into strictly, no royal family in Europe had less pretensions to claim, both sides referred themselves to the ancient constitution for the decision of this point. The king's friends urged that all lands were holden from him by services, and that this was one of his prerogatives, and a necessary one to the defence of the state. They produced several instances of its having been done, and submitted to, not only in the times of the worst, but of some of the best kings; and as to acts of parliament against it, they were extorted from the monarchs in particular exigencies, and could not bind their successors, as their right was from God.

THE advocates of the people, on the other hand, insisted, that, in England, as in all other feudal countries, the right of the king was founded on compact; that William the Conqueror was not master of all the lands in England, nor did he give them on these terms; that he claimed no right but what the Saxon kings had, and this they certainly had not; that he

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† Firma Burgi, ch. 4. 5. 11.

established and confirmed the Saxon laws, except such as were by parliament altered; that he gave away none but the forfeited lands, and gave them on the same terms as they were generally given in feudal countries, where such a power was in those days unknown. They admitted, that, in fact, the kings of England had sometimes exercised this power, and that, on some occasions, the people submitted to it. But they insisted, that most of the kings that did it were oppressors of the worst kind in all respects; that the subjects, even in submitting, insisted on their ancient rights and freedom, and every one of these princes afterwards retracted, and confessed they had done amiss. If one or two of the best and wisest of their kings had practised this, they insisted that their ancestors acquiescence once or twice, in the measures of a prince they had absolute confidence in, and at times when the danger, perhaps, was so imminent as to stare every man in the face, (for it was scarce ever done by a good prince) as when there was not a fleet already assembled in the ports of France to waft over an army, should not be considered as conveying a right to future kings indiscriminately, as a surrender of their important privileges of taxation. They insisted that these good and wise kings had acknowledged the rights of the people; that they excused what they had done, as extorted by urgent necessity, for the preservation of the whole; that, by repeated acts of parliament, they had disavowed this power, and declared such proceedings should never be drawn into precedent. They observed, that there was no occasion for the vast demerit of the king, if he had this extraordinary prerogative to exert whenever he pleased. They denied the king's divine right to the succession of the crown, and that absolute unlimited authority that was deduced from it. They insisted that he was a king by compact, that his succession depended on that compact, though they allowed that a king intitled by that compact, and acting according to it, has a divine right of government, as every legal and righteous magistrate hath. They inferred, therefore, that he was a limited monarch, and consequently that he and his successors were bound by the legislative, the supreme authority †.

THE advocates of the king treated the original compact as a chimera, and desired them to produce it; which the other side thought an unreasonable demand, as it was, they alledged, transacted when both king and people were

† Bibliotheca politica, Dial. 5. and 10.

were utterly illiterate. They thought the utmost proof possible was given by quoting the real acts of authority, which the Saxon kings had exercised; among which this was not to be found; that the Norman kings, though some of them had occasionally practised it, had, in general, both bad and good princes, afterwards disclaimed the right, and that it never had (though perhaps submitted to in one or two instances) been given up by their ancestors, who always, and even to the face of their best princes, insisted that it was an encroachment on those franchises they were intitled to by their birthright.

SUCH, in general, were the principles on which the arguments were maintained on both sides: for to go into *minutiae*, would not consist with the design of this undertaking. I apprehend it will be evident from this detail of mine, though I protest I designed to represent both sides fairly, that I am inclined to the people in this question. I own I think that any one that considers impartially the few monuments that remain of the old Saxon times, either in their laws or histories, the constant course since the conquest, and the practice of nations abroad, who had the same feudal policy, must acknowledge, that though this right was claimed and exercised by John, Henry the Third, Edward the First, Second, and Third, Richard the Second, and Henry the Eighth, it was in the event disclaimed by every one of them, by the greatest of our kings, Edward the First and Third, and Henry the Eighth, with such candour and free will, as enforced confidence in them; by the others, in truth, because they could not help it. I hope I shall stand excused, if I add, that the majority of those who engaged in the civil war, either for king Charles, or against him, were of the same opinion. For, had he not given up this point, (and indeed he did it with all the appearances of the greatest sincerity) he would not have got three thousand men to appear for him in the field. But, unfortunately for his family, and us, (for we still feel the effects of it from the popish education his offspring got abroad) his concession came too late. He had lost the confidence of too many of his people, and a party of republicans were formed; all reasonable securities were certainly given; but upon pretence that he could not be depended upon, his enemies prevailed on too many to insist on such conditions, as would have left him but a king in name, and unhinged the whole frame of government. Thus the partizans of absolute

monarchy on one side, and the republicans, with a parcel of crafty ambitious men, who for their own private views affected that character, on the other, rented the kingdom between them, and obliged the honest, and the friends to the old constitution, to take side either with one party or other, and they were accordingly, for their moderation and desire of peace, and a legal settlement, equally despised which ever they joined with †

I shall make but one observation more ; that though it is very false reasoning to argue from events when referred to the decision of God, as to the matter of right in question ; I cannot help being struck with observing, that though this has been a question of five hundred years standing in England, the decision of providence hath constantly been in favour of the people. If it has been so in other countries for two hundred or two hundred and fifty years past, which is the utmost, let us investigate the causes of the difference, and act accordingly. The ancients tell us it is impossible that a brave and virtuous nation can ever be slaves, and, on the contrary, that no nation that is cowardly, or generally vitious, can be free. Let us bless God, who hath for so long a time favoured these realms. Let us act towards the family that reigns over us, as becomes free subjects, to the guardians of liberty, and of the natural rights to mankind ; but above all, let us train posterity, so as to be deserving of the continuance of these blessings, that Montesquieu's prophecy ‡ may never appear to be justly founded.

“ENGLAND (says he) in the course of things, *must* lose her liberties, and then she will be a greater slave than any of her neighbours.”

† Biblioth. polit. 320. 330. 333. 339. 356. 357. 370.

‡ L'Esprit des loix, liv. 11 chap. 6.

L E C T U R E XIX.

The King's power as to the making, repealing, altering, or dispensing with laws.

HAVING, in the last lecture, begun to draw the outlines of a feudal monarchy, particularly, as it antiently was in England, in order that it may be more easy to understand the nature of our present constitution ; and to see how far, and in what particulars, it has deviated from its original, either for the better, or the worse ; and having, for that purpose, begun with the regal prerogatives, and particularly with that important one, the raising of money, it will be proper to proceed to the king's power as to the *laws*, either in the making, repealing, altering, or dispensing with them : for these powers are now exercised by the sovereigns in almost all the monarchies that were antiently feudal, and have been claimed likewise in England. That this power could not originally have been in the king, in any feudal state, is plain from the detail I have given of the old German governments, and of the gradual progress and formation of the European kingdoms from thence ; and it would not only be an entertaining, but useful study for gentlemen of fortune, to trace, through the history of every nation, the several steps whereby the liberties of the people have been undermined, until the whole power hath settled in the monarch ; but I shall content myself with a few observations on this subject, drawn from the History of England, and such as, in my apprehension, will be sufficient to settle this point as to us.

If the monarchies on the continent were not absolute in this respect, much less could the Saxon kings pretend to such a power, from the very nature of the foundation of their kingdoms. The Franks, the Goths, the Burgundians, and others on the continent, were led to conquest by those who had been previously their kings, and who had a stable and settled authority over them. Very different was the settlement of the Saxons in Britain. Neither Hengist, nor any of their first kings, had been kings in Germany. They were mere leaders of companies of freebooters, who had associated them-

selves first for plunder, and afterwards to fix themselves in new seats, in imitation of the other German nations. Their leaders, therefore, could have no powers, but what were conferred upon them by their followers; and that *law-making* was not one of those powers, appears from the frequent meetings of their *witenagemots*, which was the name they gave to their general assemblies, or parliaments; and from all the laws of theirs now extant being made in them. It was the boast of the good and wise king Alfred, that "he left the people of England as free as the internal thoughts of man," a speech which could never have proceeded from the mouth of one who had the least notion of the almighty power of kings over the laws. His successors were of the same opinion. The law of Edward the Confessor, which was ratified by the Conqueror, says, *Debet rex omnia rite facere in regno, & per judicium procerum regni*, and if *omnia*, surely the making and repealing of laws, the most important of all †.

OUR historians and records from that time down undeniably shew who, in every age, were the legislators, and that the kings alone were not so. The same is expressly delivered by all the old writers on the law, Glanville, Bracton, Britton, Fleta and Fortescue. Nay, some of them, in their zeal for liberty, have gone so far, as to pervert the meaning of the civil law, which, in their time, was in high repute, and to deny the absolute power of legislation to the Roman emperor. The civil law says, *Quod principi placet legis habet vigorem*; but how doth Bracton comment upon it? *Id est non quicquid de voluntate regis temere præsumptum est, sed animo condendi jura, sed quod consilio magistratuum suorum, rege auctoritate præstante, & habita super hoc deliberatione & tractatu, recte fuerit definitum* ‡.

It must, however, be owned that many of our princes were very desirous of assuming this power. In the reign of our Henry the First, a perfect copy of the civil law being discovered at Amalfi, the princes of Europe got an idea of a monarchy more powerful and absolute than either kings or people had for many centuries before any notion of; and they were, in general, desirous enough to stretch, if they could, their limited prerogative to the height of the antient imperial despotism; but to do this by their own authority

† Asser, de Gestis Alfredi. Tyrrel, gen. introduct. to the hist. of England.

‡ Lib. 3. cap. 9. fol. 107.

authority was impossible. A wiser way was pursued. The excellency of this law was, on every occasion, extolled, not only as providing remedies, and determining, in many cases, where the feudal customs were silent, but on account also of its justice and equity; praises that, it must be owned, do belong to this law where the absolute authority of the prince is not concerned. Foundations for the teaching this law were established in all the universities, and the proficients therein were sure of ample encouragement †.

THE popes, likewise, who wanted to set themselves up in the seat of the old emperors, contributed not a little, in those days of ignorance, to spread it; so that it is not wonderful that it got ground in every country almost on the continent; and being melted into, and conjoined with the feudal customs, contributed not a little to the destruction of the freedom of the antient constitutions. The same method was attempted in England, but not with the like success. The foundation of professorships, the introducing that law, and its forms, into the courts that were more immediately under the king's influence, as the courts of the constable, the admiral, and of the universities, and the high employments its professors obtained, sufficiently shew the fondness many of our kings had for it. But the common lawyers and parliament perceived the design, and foresaw the consequences that might follow. Their opposition was steady and successful; and if they did not banish it from the courts wherein it had got footing, at least they so limited and circumscribed it, as to prevent its future progress.

THE kings who had any wisdom or prudence, in order to dissemble their real design, gave way to these restrictions, and waited for more favourable opportunities; but the imprudent and haughty Richard the Second avowed himself an open patron to this law. When the duke of Ireland, the archbishop of York, and others his minions, were accused in parliament of high treason, and the evidence being known to be so full as that they must be convicted, he made this weak attempt to screen them. He got his judges, who were his creatures, to declare the proceedings against these persons null and void, as not being regulated according to the forms prescribed by the
civil

† Giannone's hist. of Naples, lib. 11. chap. 2. Hume's hist. of England, vol. 2.

civil law : but the barons, provoked at such a bare-faced attempt, insisted they were regular, as agreeable to their own customs, and declared positively they would never suffer England to be governed by the Roman civil law, and passed sentence of high treason against the judges †.

WHENCE that king's fondness for this law arose, may be seen from the use he put it to, the protection of the instruments of his tyrannical administration; and from the many wild and unguarded declarations he made, especially that relative to his commons, *that slaves they were, and slaves they should be*, and to his parliament, *that he would not at their request discharge the meanest scullion in his kitchen*. But tho' this prince was pleased to say, that *the laws were in his breath, and that he could make and unmake them at his pleasure*, he did not think the time was come to put that vaunt in execution. He took, therefore, another way of usurping the legislative power. Having gained over a majority of the returning officers, and either intimidated or gained over the most powerful of the nobility, he called the famous parliament at Shrewsbury, after having nominated to the returning officers whom they should return; and, as he expected, this parliament, if so it may be called, was complaisant enough to compliment the king with his heart's desire. The former sentence against the judges was reversed, and consequently the civil law set up as the standard in trials of treason. And they indirectly transferred the whole legislative power to the sovereign in the following manner.

As there had been many petitions left unanswered, and many motions undecided, they gave the power of deciding these, or other matters that might arise before the next parliament, to the king, twelve peers, and six commoners. For this committee, they chose such persons, the majority of whom were at the devotion of the king, and gave him and the majority power to fill up vacancies; thereby rendering the calling any future parliament absolutely unnecessary. Thus was the constitution subverted, and in its stead set up an *oligarchy* in appearance, but in truth an absolute monarchy. But as wisely and happily as Richard thought he had conducted this affair, by which he supposed he had gained his long wished-for end, neither the seeming authority of parliament, nor the anathemas thundered in the pope's

† Differtatio Seldeni ad Fletam, cap. 7.

pope's bull against the contravenors, could satisfy the people that they were not stripped of their ancient rights, or that the king and his committee were rightful legislators. What sentiments the nation entertained appears, from their deserting him as one man, and following the first standard that was set up against him †.

SINCE the days of this unfortunate Richard, no king of England hath, in open and express terms, assumed to himself singly the right of legislation. Though James the First plainly claimed it, by implication, in many of his speeches, particularly in those famous words of his, *that as it was blasphemy for man to dispute what God might do in the plenitude of his omnipotence, so was it sedition for subjects to dispute what a king might do in the fulness of his power*. But it would be doing injustice to the house of Stuart not to acknowledge that some of the princes before them, particularly the Tudors, tho' they did not pretend to make laws, yet issued out many proclamations, or *acts of state*, as they were afterwards called, to which they exacted the same unlimited obedience as if they had been laws enacted by parliament. This is a point worthy consideration; for if all proclamations, or acts of the king and his council, require unlimited obedience, it is to little purpose whether we call them laws or not, since such they are in effect. But this, I think, will be pretty plain, if we make a proper distinction between such proclamations, or acts of the king, as are particular exertions of the executive power, which the law and constitution hath entrusted him with, and such as, affecting the whole people, should in any wise alter, diminish, or impair the rights they were before lawfully in possession of.

To give some few instances of the first sort. The appointment of magistrates, the proclaiming war or peace, the laying on embargoes, or performance of quarantine, the ordering erection of beacons in times of danger of an invasion, the granting of escheated or forfeited estates, and many more, are the antient and undoubted prerogatives of the king alone, and the subject who resists, or disobeys, in such cases, is as much a *rebel*, or disobedient subject, as if these acts were exercised by the whole legislature. But with respect to making general rules and ordinances, affecting the previous rights of the people, the case is very different. For if such were to be uni-

versally

† Bacon, hist. and polit. discourse on the laws and government of England, part 2. ch. 1. and 2. The reign of Rich. II. in Kennet's collection of historians.

verfally obeyed, it is equivalent to faying, that fubjects have, properly fpeaking, no rights at all, but hold every thing at the will of the king; a fpeech which the moft defpotic monarch in Europe would not venture to advance.

HOWEVER, I will not carry this fo far as to deny that there may cafes happen wherein the king may have this right, and wherein his proclamations and orders, even relating to fuch points, ought to be obeyed. The cafes, I mean, are thofe of a foreign invafion, or intefine rebellion, when the danger is too imminent to attend the refolutions of parliament. In fuch cafes the constitution is, for a time, fufpended by external violence, and as *salus populi fuprema lex eft*, every man is under an obligation to ufe his utmoft endeavours to reftore it, and, confequently, obliged to obey him, to whom the constitution has particularly entrusted that care. Inftances of this kind did happen during the confufions raifed by the houfes of York and Lancafter, and the princes were accordingly obeyed. Thefe precedents doubtlefs gave a handle to their fucceffors, who had no competitors to the throne, to exercife the fame power in more fettled times. But this was ufed; at firft, in a cautious and fparing manner; and Henry the Eighth, who was a monarch as unlikely to make undue condefcenfions to his people as ever lived, was glad to derive it from the grant of parliament, that his proclamations fhould have the force of laws, which was, in truth, giving into his hands the legiflative power for life †.

His great fucceffor, Elizabeth, carried this practice farther, and it will be worth while to difcover the reafon why a people, in antient times, fo jealous of their privileges, fhould to the one prince explicitly give up, and quietly fuffer the other to ufurp this power, fo effential to a limited constitution. And the caufe I take to be the critical ftate the nation ftood in with refpect to religion. The bulk of the people, glad to be delivered from the yoke of papal tyranny, and dreading its reftoration, were willing to arm their princes with a power fufficient to protect their religion from foreign and domeftic enemies; and about religion indeed, this power was at firft principally exercifed, on the footing of the papal fupremacy being transferred to the king. Their end was attained: Papifts and Puritans were both

† Hume's hift. of England, vol. 2.

both kept under, and happy in the enjoyment of their religion, they did not consider the consequences; that this very weapon might be used, by a prince of another stamp, to root out the very religion they were so fond of, and that, by admitting this exertion of power in a matter of so high consequence, it would naturally be used in others that appeared of less †.

THIS was what accordingly happened. Proclamations on other points were issued; and monopolies in trade were introduced. All monopolies, undoubtedly, were not destructive to trade. Where a new traffick has been discovered, and one that requires a large expence, and is liable to many hazards, it is very reasonable that the first undertakers should have the trade for a time confined to them, that, by the prospect of extraordinary profit, they may be encouraged to promote and settle that commerce on a solid bottom. Such monopolies, instead of hurting, tend to the promotion of traffick, and are not without similar instances in former times, I mean the kings of England appointing the towns for the staple; and had Elizabeth and James confined themselves to the erection of the Russia, the Turkey, and East India companies, and that for a limited term, their conduct would have deserved the highest applause; but that was far from being the case. Monopolies were introduced in the antient, the most common and most necessary commodities, to the great impoverishment of the nation by the advance of prices.

At first it may seem strange that the wise Elizabeth, who, on all occasions, seemed to have her people's wealth and ease at heart, should follow so destructive a course. But the great end of all her actions was the securing herself on the throne, and one of the principal means she used for that end, was the asking money from her people as seldom as possible. Hence proceeded the long leases of the crown lands, at small rents and large fines, and hence all the monopolies, which she sold to the undertakers; but better had it been for her subjects, to have raised the sums she wanted by an additional subsidy, or an easy tax, than to pay to the monopolists what they had advanced, with their exorbitant profits besides. What Elizabeth began out of policy, James continued, to supply his profusion, to such an extraordinary degree, as disgusted his people, provoked his parliament, and at last

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† Camden's reign of Elizabeth, *passim*.

made himself ashamed, inasmuch that he revoked above twenty. And now no monopoly can be raised but by act of parliament, except in case of a new invention, and that but for a short term of years †.

I COME now to the *dispensing power*, another prerogative which the Stuarts claimed, and which cost the last of them the throne. As no state can subsist without mercy as well as justice, the king hath the power of distributing this mercy, and exempting a convicted criminal from the penalty of the law, but this is only where the conviction is at his suit; thus the king can pardon a murderer convicted on an indictment in the king's name, but if he was convicted on an *appeal* by the next relation, the king cannot. The pardon belongs to the appellant. But there is a wide difference between a *pardon*, that is remission of punishment after the fact, and *dispensing*, which is giving a previous licence to break the law. A general dispensation is, in fact, a repeal, and a particular one is a repeal *quod hunc*, and therefore can belong only to the legislature. The Roman emperors, and the popes, as legislators, assumed this power, and Henry the Third, an apt pupil of his lord and master the pope, introduced the practice into England. In his reign a patent, with a *non obstante* to any law whatsoever, was produced into court before Roger de Thurkeby, and this honest judge was astonished at the innovation, as Matthew Paris tells us in these words: *Quod cum comperisset, ab alto ducens suspicia de prædictæ adjectionis appositione, dixit, heu, heu hos utquid dies expectavimus, ecce, jam civilis curia exempla ecclesiasticæ, conquinatur, & a sulphureo fonte rivulus intoxicatur* ‡.

† Wilson's life and reign of James I. ap. Kennet.

‡ Bibliotheca politica, dial. 11. Bacon, hist. and political discourse, part i. chap. 64.

L E C T U R E XX.

Lords of Parliament or Peers—Earls and Barons—The earlier state of Baronies in England—The Barones majores & minores—Barons by writ and by letters patent—The different ranks of Nobility.

NEXT in rank to the king are the *lords*, that held immediately of him by military service, as long as that species of tenure subsisted; and whom, from their privilege of sitting in parliament in their own rights, are frequently called *Lords of Parliament*, and in common speech are called *Peers*, though that word properly signifies any *co-vassals* to the same lord. Thus every immediate vassal of a baron are peers of that barony, and the accurate description of the great personages I am speaking of is *Pares Regni*. Of these there were, antiently, two ranks only, in England, *Earls* and *Barons*. Indeed, abroad also, to speak properly, there were but two likewise: for there was no difference in power and privilege between the *dukes* and *counts*, or *earls*. But as every earl is a baron, and something more, and as it is a maxim of our law, that every lord of parliament sits there by virtue of his barony, it will, in the first place, be necessary to see what a baron is.

THE word *baron* of itself originally, did not, more than peer, signify an immediate vassal of the king; for earls palatine had their barons, that is, their immediate tenants; and, in old records, the citizens of London are stiled barons, and so are the representatives of the cinque ports called to this day. Baron, therefore, at first signified only the immediate tenant of that superior whose baron he is said to be, but by length of time it became restrained to those who, properly and exactly speaking, were *barones regis & regni*, and even not to all of these, but to such only as had manors and courts therein. For though, by the principles of the feudal constitutions, every immediate military tenant of the crown, however small his holding, was obliged to assist the king with his advice, and entitled likewise to give or refuse his assent to any new law or subsidy, that is, to attend in parlia-

ment. This attendance was too heavy and burthenfome upon fuch as had only one or two knights fees, and could not be complied with without their ruin. Hence arofe the omiffion of iffuing writs to fuch, and which, being for their eafe, they acquiefced in, attendance in parliament being confidered at that time as a burthen. Thus they loft that right they were entitled to by the nature of their tenure, until the method was found out of admitting them by representation. Hence arofe the diftinction between *tenants by barony*, and *tenants by knight fervice in capite* of the king. The former were fuch military tenants of the king, as had eftates fo confiderable as qualified them, without inconvenience, to attend in parliament, and who were therefore entitled to be fummoned. The *quantum* of this eftate was regularly thirteen knights fees and one third, as that of a count or earl was twenty; that is, as a knight's fee was then reckoned at twenty pounds *per annum*, the baron's revenue was four hundred merks, or two hundred fixty-fix pounds thirteen fhilling and four-pence, and the earl's four hundred pounds, anfwering in value of money at prefent to about two thoufand fix hundred, and four thoufand pounds yearly †.

SUCH was the nature of all the baronies of England for about two hundred years after the conqueft; and they are called *baronies by tenure*, becaufe the dignity and privileges were annexed to the lands they held; and if thefe were alienated with the confent of the king (for without that they could not) the barony went over to the alienée. The manner of creating thefe barons was by investiture, that is, by arraying them with a robe of ftate, and a cap of honour, and girding on a fword, as the fymbols of their dignity. Of thefe Matthew Paris tells us there were two hundred and fifty in the time of Henry the Third, and while they flood purely on this footing, it was not in the king's power to encrease the number of the baronies, though of barons perhaps he might. For as William the Conqueror was obliged to gratify feveral of his great officers according to the number of nien they brought, with two or more baronies, whenever thefe fell into the hands of the crown by efcheat, either for want of heirs, or by forfeiture, it was in the king's power, and was his intereft, to divide them into feparate hands. The fame thing likewise happened, when, by an intermarriage with an

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† Madox, *Antiq. of the Exchequer*, vol. I. p. 197; 198. *Baronia Anglica*, book I. chap. I. Spelman, *voc. Baro*.

heirefs, more baronies than one came into the hands of a nobleman, and efcheated to the crown †.

BUT the number of thefe feudal baronies could not, ftrictly or properly fpeaking, be encreafed by the king; for they could be created only out of lands, and there were no lands vacant to create new ones out of, for the king's demefnes were, in thofe days, unalienable. However, we find, at the end of Henry the Third's reign, and even in John's, that the number of baronies were actually encreafed, and a diftinction made between the *barones majores*, and *minores*. The *majores* were thofe who flood upon the old footing of William, and had lands fufficient in law, namely, the number of knights fees requifite. The *minores* were fuch as held by part of a barony; as when an old barony defcended to, and was divided among fifters; in which cafe, when the husband of the fifter whom the king pleafed to name, was the baron of parliament; or elfe were newly carved out of the old baronies that had fallen in by efcheat; as fupposing the king had granted fix knights fees of an old barony to one, to hold with all the burthens, and to do the fervice of an entire barony, and the remaining feven and one third to another, on the fame terms. But the attendance of thefe minor barons alfo, at length became too burthensom for their circumftances, and many of them were glad to be excufed. The kings took then the power of paffing by fuch as they thought unable, by not fending them writs of fummons, and John extended his prerogative even to omit fummoning fuch of the *majores* as he imagined were inclined to oppofe him. This however at length he was obliged to give up: For in his Magna Charta it is faid, *Ad habendum commune confilium regni faciemus summoneri archiepifcopos, epifcopos, abbates, commites, & majores barones regni figillatim, per literas nostras* †.

THE *barones majores* were then fully and plainly diftinguifhed from the *minores*, and I thing it will not be doubted they were fuch as had the full complement of knights fees that made up an antient barony; and, accordingly, we find in 1255, when Henry the Third had neglected fummoning fome of thefe, the others refufed to enter on any bufinefs, *Quia omnes, tunc temporis, non fuerunt, juxta tenorem Magnæ Chartæ fuæ, vocati, et ideo,*
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† Brady's introduction, in append. Baronia Anglica, p. 33.

‡ Selden's titles of honour, part 2. chap. 5. Baronia Anglica, book 1. chap. 2.

sine paribus suis, tunc absentibus, nullum voluerunt tunc responsum dare, vel auxilium concedere vel prestare. No king since, ever omitted to summon all the greater nobility, until Charles the First was prevailed upon to forbid the sending a writ to the Earl of Bristol by Buckingham, who was afraid of being accused by that nobleman; but on the application of the house of lords, and their adjourning themselves from day to day, and doing no business, the writ at last was issued.

IN the reign of Henry the Third also, the king's prerogative of summoning or omitting the lesser barons was likewise ascertained by an act of parliament since lost, as we find by these words from history: *Ille enim rex (scilicet Henricus Tertius) post magnas perturbationes, & enormes vexationes inter ipsum regem, Simonem de Morteforti, & alios barones, motas & sopitas, statuit & ordinavit, quod omnes illi commites & barones regni Angliæ, quibus ipse rex dignatus est breviam summonitionis dirigere, venirent ad parlamentum suum; & non alii nisi, forte, dominus rex alia illa breviam illis dirigere voluisset†.* And from henceforth no nobleman could sit in parliament without a writ. But there was this difference between the greater and the lesser barons, that the former had a right to their writ *ex debito justitiæ*, to the latter it was a matter of favour; but when summoned, they, being really barons, had the same rights with the rest, though sitting, not by any inherent title, but by virtue of the writ. The other lesser barons, who were generally omitted to be summoned, by degrees mixed with the other king's tenants in capite, and were thenceforth represented by the knights of the shires‡.

BUT these baronies by tenure being long since worn out among the laity, it is proper to proceed to the two ways now in being of creating peers, by writ, and by *letters patent*. It is the lord Coke's opinion, and in this he has been followed ever since, that a writ to any man, baron, or no baron, to sit in parliament, if once he hath taken his seat in pursuance thereof, gains a barony to him and the heirs of his body. And though the law, principally on the authority of that great lawyer, is now so settled, certainly it is comparatively but a novel opinion, and very ill to be supported by reason,

† Camden, Britan. p. 122.

‡ Selden, tit. Honour, part 2. chap. 5. § 21.

son. The words of the writ are, *Rex tali salutem, quia de advisamento & assensu concilii nostri, pro quibusdam arduis & urgentibus negotiis statim & defensionem regni nostri Angliæ contingentibus, quoddam parlamentum nostrum apud Westmonast. tali die, talis mensis, proximo futuro teneri ordinavimus, & ibidem vobiscum, ac cum prelatiis magnatibus & proceribus dicti regni nostri, colloquium habere & tractatum; vobis in fide & ligeantia quibus nobis tenemini, firmiter injungendo mandamus, quod consideratis dictorum negotiorum auctoritate & periculis imminuentibus, cessante excusatione quacunque, dictis die & loco personaliter interfitis nobiscum, ac cum prelatiis magnatibus & proceribus super dictis negotiis tractaturi, vestrumque consilium impensuri, & hoc sicut nos, & honorem nostrum, ac expeditionem negotiorum prædictorum diligitis, nullatenus omittatis*†.

THAT this writ must be obeyed, there is no doubt, for every subject is, by his allegiance, obliged to assist the king with faithful counsel: But what right the party summoned acquired thereby is the question. The words are not only personal to him, but restricted likewise to a particular place and time; and accordingly, in antient times, we find many persons summoned to one parliament, omitted in the next, and summoned perhaps to the third. There is not a word therein that hints at giving the least right to an heir; and what reason can be assigned why a man, by this writ, should gain an estate of inheritance in a peerage, when, in letters patents, it is admitted that he gains only an estate for life, without the word *heirs*. That antiently there was no such notion appears from the summons to parliament, where frequently we find the grandfather summoned, the father passed by, and the grandson afterwards summoned: Nay, in the rolls there are instances of ninety-eight persons being summoned a single time only, and neither themselves, nor any of their posterity, ever taken notice of afterwards. Or, if we were to allow that this writ created an inheritance, what reason can be given why it should be an estate tail only, and be confined to the heirs of the body, and not, as all other new inheritances, created generally, go to the collateral heirs?

BUT, in order to discover plainly what privileges persons so called by writ, had, or could obtain in those times, it will be proper to distinguish them into three kinds of persons. First, then, they were either some of the

minores

† Baronia Anglica, book 2. chap. 1. Selden's tit. Hon. part 2. chap. 5. § 22.

minores barones by tenure; and these, when called, had certainly all the privileges of the greater; or else they were not barons at all, but plain knights or gentlemen; and, with respect to these, it is plain they had a right to deliberate, debate, and advise. But the better opinion is, they had no right to vote, but were assistants and advisers only, as the judges are at present; for it is absurd to suppose that, in those times, when the commons were low, and inconsiderable, and the barons were more powerful than the crown, these latter should suffer their resolutions to be over-ruled at the pleasure of the king, by his calling in such numbers as we find he often did, which must have been the case, if all he summoned had votes. But these two kinds of persons gained by their writ, or sitting in consequence of it, originally, no farther right than to be present at that time. However, by many of these persons and their heirs having been constantly summoned, especially since Henry the Seventh's reign, and the ancient practice of omitting any who had been very frequently so, going into disuse, the distinction between the greater and the lesser barons was forgot, and that opinion prevailed which my lord Coke had adopted, and which is now the law, that a man, having once sat in parliament in pursuance of the king's writ, acquires thereby an estate tail to him and the heirs of his body †.

THERE were yet another kind of persons, not peers, that might be summoned by writ. These were the eldest sons of peers, to whom the father's barony must descend; and in such case, if the heir was called by the name of a barony that was in his father, he was a baron to all intents and purposes. But it seems very plain, that this was not a new creation of a barony; for in that case the son so called should have been the lowest peer, whereas the practice is the contrary. The eldest son of the duke of Norfolk, called by the title of lord Mowbray, sat first baron, because that barony of his father's is the antientest in England. It seems, therefore, that this was considered as a transfer of the antient barony by the joint consent of the father and king, and the father still continues to sit by the remaining peerage in him. Accordingly we find no instance of a baron's son sitting on such a summons, unless the father had another barony by which he might sit. If the father indeed had a higher title, that has been reckoned sufficient to support his seat, though his only barony was transferred to the son. This then being no new creation, but

† Coke on Littleton, lib. 2. chap. 8. § 159. *Baronia Anglica*, p. 164. et seq.

but a temporary transfer only of an old peerage, it should seem, that this title, when once merged in the greater by the father's death, should go according to the old limitation ; but of late we find them considered as new creations. On the death of the late earl of Derby, Sir Edward Stanley, his sixth cousin, succeeded, and sits in parliament as baron Strange, by Henry the Seventh's creation ; but an elder son of a former earl of Derby, having been called by writ while his father was living, the Duke of Athol, as his heir by the female line, sits by the same title of baron Strange of king Charles the First's creation.

THE descent of these two kinds of baronies are directed by the rules of the descent of other inheritances at common law, and consequently females are capable of succession, but with two exceptions ; first, that half blood is no impediment, and consequently the half brother excludes the sister ; secondly, that the honour is not divisible, and therefore, if there be two or more sisters, heiresses, the title is *in abeyance*, that is, is suspended, until the king makes choice of one of them and her heirs ; though by constant usage the law seems to be verging fast to a constant descent to the eldest†.

THE third method of creating peers is by *letters patent*, which is the most usual, and esteemed the most advantageous way ; because a peerage is thereby created, though the new nobleman hath never taken his seat, which is not the case of a barony by writ. As to the manner of these creations, there has a notable difference intervened since the accession of Henry the Seventh from what was the practice before Richard the Second. In his eleventh year began this method of creating by patent, in favour of John de Beauchamp, who, though summoned, never sat there, but was attainted by the next parliament, and afterwards executed. But, the attainder out of the case, his patent in law could never have been deemed valid, because Michael de la Pole was the lord chancellor who affixed the seal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a single and ineffectual attempt of that weak prince to create a new peer without the assent of parliament, which was the usual way, above thirty having been made so in that very reign. His successors were too wise to follow this example ; for

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† Coke on Littleton, p. 166. St. Amand on the legislative power of England, p. 193.

every barony newly created, till the union of the roses, which were about fourteen, were, every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three; and even these, on a close examination, will appear not to be new baronies, but *regrants* of old feudal baronies by tenure, which, undoubtedly, were all in the sole disposition of the king †.

BUT Henry the Seventh, having trodden down all opposition, was fortunate enough to carry the point Richard had vainly attempted, and acquired for his successors that prerogative which they have since enjoyed, of creating peers at pleasure. The descent of these titles, created by patent, is directed by the words of the creation. If heirs are not mentioned, it is only an estate for life; if to a man and heirs of his body, females are not excluded, but the general way is, to the heirs male of the body of the grantee, perhaps, with remainders over, and they descend as other estates entailed. The case of the duchy of Somerset was singular. Edward Seymour having sons by two venters, was created duke of Somerset, and his heirs male of his second marriage, remainder to his heirs male by his first. This title continued near two hundred years in the younger branch, until, upon its failure in the late duke of Somerset, Sir Edward Seymour, the present duke, the heir by the prior marriage, succeeded by virtue of the remainder.

IN the case of lord Purbeck, in Charles the Second's reign, it was controverted whether a title could be extinguished, for as lord Purbeck had surrendered his honour by fine to the king, and there it was determined, and so the law now stands, contrary to many precedents that were produced, that the title is inherent in the blood, and while that remains uncorrupted, can by no means be extinguished by surrender or otherwise, and this, generally, whether the peerage be created by patent or by writ; for Purbeck's was by writ. In case of a patent where the dignity is expressly entailed, it is surely as reasonable that it should be impossible for the possessor to destroy the entail, as in an estate tail of land, created by the king, and yet in old times there had been many instances to the contrary. I shall mention but two that happened in this kingdom.

SIR

† Selden, tit. Hon. part 2. chap. 5. § 27. and 28.

SIR Thomas Butler was created baron Cahir by Henry the Eighth to his heirs general. His heirs male failed in his son Edmond, the second baron, and his nephew, Sir Theobald, was, in 1683, by queen Elizabeth created baron Cahir ; but it being found that Sir Thomas left daughters, to one of whom the title ought to have been assigned by the queen, one of them, and the heir of the other, who was dead in 1685, bargained, sold, and released to Sir Theobald and his assigns, their right and title to the said honour. The other was the case of the honour of Kingsale. Charles the First, apprehending the barony of Kingsale to be extinguished by attainder, created Sir Dominick Sarsfield viscount Kingsale, but, upon lord Kingsale's petition, and proof made by him that his barony still subsisted, it was ordered that Sarsfield should surrender his viscounty of Kingsale, and be created viscount of Kilmallock, with his former precedence, which was accordingly done.

THESE two instances were, indeed, of a particular nature, and calculated to rectify grants that had arisen from error ; but in England there were, in ancient times, many instances of such surrenders without error. They were, indeed, generally made in order to obtain higher titles ; and therefore it is no wonder they passed *sub silentio*, and were never disputed. But as to the old baronies by tenure that were annexed to land, nothing is clearer than that, by the king's consent, they might be aliened or surrendered, notable instances of which happened in the reign of Henry the Third. Andrew Giffard, baron of Pomfret, surrendered to the king ; and Simon de Montfort, a nobleman of large possessions in France, had two sons by the heiress of the earldom of Leicester, in whose right he was earl of Leicester, and, having a mind to settle his second son in England, assigned the earldom over to him, as Selden says ; or, which comes to the same thing (for the eldest son was equally defeated) surrendered it to the king, who granted it to the second, according to Camden.

ALL noblemen are equally so, and, therefore, each others peers ; but they differ in rank and precedence. The ranks are five ; *dukes, marquisses, earls viscounts, barons*. The first duke was created by Edward the Third ; the first marquiss, by Richard II. ; the first viscount, by Henry the Sixth.

Though their dignities are now personal, and annexed to the blood, yet as they were originally annexed to land, so much of the old form remains, that, in their creation, they must be named from some place in some county; though I do not apprehend it to be material at this day, whether there really be such a place or not. With respect to the raising a lord from a lower degree of dignity to a higher, I should observe, that long before Henry the Seventh's time, the king had the right solely in himself, though it was frequently done in parliament; for this was not adding to the number of the peers, but an exertion of the ancient prerogative of his settling precedence according to his pleasure. This continued in England till Henry the Eighth, by act of parliament, settled it according to antiency, and it still continues in Ireland, though it has not been exerted since Henry the Seventh's time, when lord Kingsale, a Yorkist, was obliged to change places with lord Athenry, a Lancastrian, and from first became the second baron, which hath continued his rank, till lately, that Athenry was created an earl †.

† Camden's Introd. to his Britan. p. 234. et seq. Baronia Anglica. Selden, tit. hon. part 2. chap. 5. § 29. 30. 31.

L E C T U R E XXI.

Earls or Counts as distinguished from Barons—The office of Counts—Their condition after the conquest—Counties Palatine in England—Counties Palatine in Ireland—Spiritual Peers—The trials of Noblemen.

IN my last lecture I treated of baronies, which are the lowest rank of peerage, and of the right whereby this class of nobles sits in the great council of the nation, and also of the various methods that have prevailed in different ages of creating them; but before I have done with the higher nobility, it will be necessary to say something of *earls* or *counts* as distinguished from barons; for they differ from them, not only in having a greater number of knights fees, and consequently having a greater revenue, but in possessing also a more extensive jurisdiction. The institution of *counts*, I observed in a former lecture, wherein I treated of the progress of the feudal law, was not, originally, a part of the feudal policy. They were, indeed, always chosen out of the king's companions, who resided in his house, and were therefore called *comites*, but they were not set to preside over Germans, who were the conquerors, but over such of the old inhabitants, Romans or Gauls, who by a voluntary submission had retained their freedom, and who in every respect, except bearing a share in the legislature or government, were on an equal footing with the conquerors †.

THE office of these counts was threefold, to judge these freemen in peace, to conduct them in war, to manage the king's demesnes in their respective districts, and to account with him for them and the profits of his courts of justice; which were very considerable when all offences were punished by fines. At the beginning they were temporary officers, but they soon became fixed for life, and at length, towards the latter end of the second, and in the beginning of the third race in France, they got, through the weakness of the crown, estates in fee in their counties; and either by grants of the kings

† Selden, tit. hon. part 2. ch. 1.

kings, or by usurpation, converted the profits they before accounted for to the crown, for their own use, and held their courts in their own name. In short, they became petty sovereigns, paying only homage, and the usual services of ward, marriage, and relief to their supreme lord; and as such they coined money, levied war against their neighbours, nay frequently against the king himself; until Lewis the Eleventh found the means of humbling them, and brought the crown out of tutelage, as the French express it †.

THE present state of Germany is an exact representation of what the French and the other continental monarchies were in those days, except that the kings had large countries, and multitudes of vassals immediately subject to them; whereas the emperor hath now none. But in England these lords, tho' very powerful, never ascended to such a pinnacle of grandeur. Their first constitution here we must refer to the time of the division of England into counties, to which they had a reference, which is generally ascribed to Alfred. Their power and office was exactly the same with the counts on the continent in those early times, namely, to judge and lead the freemen to war. For the greatest part of the lands of England were at that time allodial, as is proved by Spelman, contrary to the opinion of Sir Edward Coke; although, with him, it must be allowed, that there were fiefs also before the Conquest, and that they were not all introduced at that period. Till that time their office was only for life, and they were known by various names, as *duces*, *comites*, and *consules* in Latin, *ealdermen* in Saxon, and *earls* in the Danish tongue ‡.

BUT William, having turned all the lands into feudal, was obliged to put his earls on the same footing, that those on the continent were in his time, and consequently to make them hereditary. However he and his successors were careful not to give them such extensive powers and revenues as they had abroad. The county courts were held in the king's name, neither were the earls allowed the whole profits of them, two-thirds of them being reserved to the king; and in appearance to ease them, who were often obliged to attend in council or in war, but in reality to prevent the king's

† Du Bos, *hist. critique de L'établissement de la monarchie Française*, tom. 3. 497, &c.

Mascou's *hist. of the antient Germans*, b. 16. § 36.

‡ Spelman's *treatise of Feuds and Tenures*.

king's being defrauded, and to prevent the too great influence which their judging in person might acquire to them in their districts, officers chosen by the people, and approved by the king, were substituted to administer justice under the names of *vice comites*, or sheriffs; these were to pay to the king the two-thirds, and to the earl his third of the profits, which was in those times looked upon as so incident to an earldom, as to pass with it, although express words were wanting; so that in those times an earl and a county were correlatives †.

EACH earl took his title from some one county, and the number of the one could not exceed that of the other. King John, however, altered their nature in some measure, and his example has been followed in depriving the earl of the thirds of the county profits; for he created Henry de Bohun earl of Hereford, and granted to him twenty pounds yearly, to be received out of the third penny of the county in lieu thereof. But it is plain that the justice and success of this invention was doubted of at first, for John took a collateral security from the earl, that he should never in his earldom claim any more than the twenty pounds expressly granted him. These sums, so granted, are called *creation money*, and were formerly expressly granted out of the third penny of the county; but of late have been made payable at the Exchequer. Such was the nature of the ancient earldoms that were by tenure, and had reference to counties. The modern ones, that are merely honorary, and go with the blood, were first made in parliament. Afterwards the king was allowed, by his sole authority, to advance a baron to a higher rank; for that was not adding to the number of the peers; but the creation of a bare gentleman a peer at once hath only been practised since the accession of Henry the Seventh ‡.

BEFORE I quit this head of earldoms, it will be proper to say somewhat about *counties palatine* which had extraordinary privileges, like unto the counties and duchies abroad. The first was that of Chester, erected by the Conqueror, in favour of his nephew Hugh Lupus, in these words: *Totumque hunc comitatum tenendum sibi & hæredibus, ita libere ad gladium, sicut ipse rex tenet Angliam ad coronam.* The effect of this creation was to have *jura regalia*;

† Selden, tit. hon. part 2. ch. 5.

‡ Selden, tit. hon. part 2. ch. 5. § 10.

regalia; for the earl palatine might pardon treason, murder, and other offences, might make justices of assize, gaol delivery, and of the peace; might create barons of his county palatine, and confer knighthood. They had likewise all forfeitures, that arose by the common law, or by any prior statute; but forfeitures arising from statute, made after the erection of the county palatine, belonged to the king. They had courts as the king had at Westminster, and out of their chancery issued all writs, original and judicial. Neither did the king's writs run within the county palatine, except writs of error, which were in the nature of appeals, or in cases where, otherwise, there would be a failure of justice. All manner of indictments and processes were made in the name, and every trespass was laid to be done against the peace of him that had the county palatine. But these and some other privileges have been taken away, and annexed to the crown, in whose name they must now be; but the *teste* of the writs is still in the name of the earl palatine †.

Of these counties palatine there are now in England four, Lancaster united to the crown, Chester to the principality of Wales; Durham and Ely, each belonging to the bishop of the place; but the privileges of these two are going fast into disuse. But in this kingdom, (Ireland) for the encouragement of adventurers, the whole country, as fast as it could be reduced, was erected into palatinates, and very little, except the cities, retained in the king's hand. The making so many great lords, who had frequent quarrels with each other, and that at such a distance from the seat of government, was one great occasion of the slowness of the settlement of the kingdom. For, to strengthen themselves, such of them as resided here attached the natives to them, and taught them the use of arms, and others that dwelt in England entirely neglected to send hither any defence, so that, by the end of Edward the Third's time, the Irish had repossessed themselves of almost the whole kingdom, if we except five or six counties; whereas in John's reign they held not above half, and that under homage and tribute, either to the king, or the lords, who had grants from him.

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† *Baronia Anglica*, p. 150, et seq. Selden, tit. hon, part 2. chap 5. § 8. Bacon, hist. and polit. discourse on the laws of England, part 1. ch. 29.

I SHALL give a short detail of these palatinates, and an account of the manner of their distinguishment. The present county of Gallway, under the name of the county of Cannaught, was a palatinate in the De Burghs ; as was Ulster, first in De Courcy, then in De Lacy ; and these two were united by De Burgh's marriage with Lacy's daughter, and afterwards descended to Lionel of Clarence's daughter, who married the earl of March, and, in the person of Edward the Fourth, merged in the crown. In the same prince, likewise, merged that of Meath, which, being in another branch of the Lacy's, was divided into the eastern and western between two daughters. The former came by descent to the house of March, and so to Edward the Fourth. Strongbow had the grant of Leinster as a Palatinate, which at length was divided into five distinct ones between his grand-daughters, who being married to English noblemen, took no care for the defence of the country, their titles, estates, and Jura Regalia were taken from them by act of parliament, under Henry the Eighth.

KILDARE, being in the hands of the earl of that name, escaped for a little time, until he was attainted under the same king, where it ended ; for though his heir was restored to the title and estate by queen Mary, it was with an express exception of the palatinate. The kingdom of Cork, containing that county and the south of Kerry, was another palatinate, granted to Fitz Stephen and Cogan, who made partition between them ; and on Fitz Stephen's death without issue, his part escheated to the crown. Cogan's share should have gone to the Courcys and Carens, but they could never obtain the possession of it ; for the earl of Desmond got the estate by purchase from a Cogan who pretended a right, and held it ; so this share of the palatinate fell likewise into disuse. Desmond, indeed, had interest enough to get a new palatinate created for himself in the county of Kerry, called Desmond, which for repeated rebellions was justly forfeited to queen Elizabeth.

EDWARD the Third erected the palatinate of Tipperary in favour of the earl of Ormond, who was grandson to Edward the First, which continued in that family, with some interruptions, until the attainder of the late duke in 1715. Thus by degrees the crown regained the power it had parted with, and was at length enabled, though with difficulty, to reduce the whole kingdom, which had been well nigh lost by means of such profuse grants.

BESIDES the temporal peers, there are spiritual ones, that is the bishops, and, they have seats in parliament, which antiently many abbots also enjoyed. The original of this right was from the feudal customs. The priests of the Germans, while they continued pagans, were necessary attendants in their general assemblies, not only for advice, but the benefit of their prayers and divinations. When these nations embraced Christianity, they transferred the same veneration and honour to their new instructors and bishops; and sometimes other churchmen of eminence, though they held lands not by military tenure, but by what is called *free alms*, were, in every nation as well as England, members of the states of parliaments. But since the conquest they have begun to sit by another right, namely by their baronies; the conqueror having converted their estates in free alms into baronies, and to their great mortification, subjected them to military service †.

UPON this head several questions have been propounded, as how far they are lords of parliament, and whether the clergy are a third estate of the realm, and sit solely in that right. This is a question of some importance, because if they make a distinct estate, no law would be good to which the majority of them did not consent. Certain it is that in France, the clergy made one estate, the nobility the second, the burghers the third; and in Sweden the peasants make the fourth, all sitting in distinct houses, the majority of each of which must concur. And therefore I do believe, that when, in England, we talk of *three estates*, the clergy, not the bishops alone, make one of them, contrary to the modern opinion, that the king is the first estate, and the bishops and the nobility the second; for the king is in no country reckoned one of the estates, but the head of all. However from this no argument can be drawn that the bishops should sit separately, or that a majority of them, as representing the clergy, should concur.

As to sitting separately, it is pretty clear that, by the old law, none were members of parliament, but the immediate military tenants of the king, and that they sat all in one house, however their titles and fortune might differ; being all equal as to rank, with respect to the king, and all having the same rights. The division of parliament into two houses was never known in Scotland, who, in all probability, modelled their constitution from their neighbours;

† Coke on Littleton, lib. 2. § 135. Selden, tit. hon. part 2. ch. 5. § 19.

bours; nor doth it appear in England previous to Edward the First, but arose, probably, from the great barons disdaining to sit, as equals with citizens and burgeses. For even, after this time, they did not disdain to associate with the knights of the shires, who represented the minor barons, and other military tenants, as appears by many instances. But for a number of centuries past the gentry, which were formerly considered as a lower noblesse, and are so abroad, have been melted into one body with the other commoners †.

If then there was originally but one house, and if, since the division, the bishops have constantly sat in the house of peers, there can be no pretence for any privilege for them more than for the body of barons or earls. It is urged, likewise, that several valid acts of parliament were passed without any bishop present; but this happened only in distracted times; and, whoever might think it prudent or proper to absent themselves at a particular season, it will hardly be said to be a good parliament when they were not summoned; and if, at any time, they refused to attend, there was no reason why the public business should stop, as they sat, not as an independent constituent part of parliament, but each distinctly for himself, in right of his barony. From these occasional and general absences of theirs, an opinion grew up by degrees, and now is established law, that there is a material difference between bishops and lay lords, in respect to their nobility. In truth, that they are not peers to each other, and consequently that a bishop cannot sit in judgment on the life of a peer, neither is he to be tried by the peers, but by a jury of commoners.

It is worth while to see how these opinions grew up; for, from the original constitution, every bishop, being a baron by tenure, and having a fee simple therein, had certainly as great right as other barons; but the canon law having forbid any ecclesiastics being concerned in matters of blood, and they being obliged by the common law to attend judgments in parliament, were in a great strait between the two laws, how to act when a peer was capitally accused. They at length obtained from Henry the Second in the constitutions of Clarendon, the following allowance: *Et sicut ceteri barones debent interesse judiciis curiæ, regis quousque perveniatur ad diminutionem mem-*

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brorum,

† Robertson's hist. of Scotland, book 1. p. 68. Essays on Brit. Antiq. Ess. 2.

brorum, vel ad mortem; where the last words are plainly an exception in their favour, in derogation to the common law, on account of their peculiar circumstances under the canon. However, as many questions might arise before it came to the last vote, that might intirely influence the final determination, they used to absent themselves totally, and this going on for ages, and the feudal baronies wearing out, and all titles becoming fixed to the blood, not to the land, they came to be considered as peers of a different nature, because their blood did not succeed, and that which was first a favourable permission, was construed a prohibition; and when this was once established, it followed necessarily, that, not being peers to the nobility by blood, they must be tried by commoners †.

WITH respect to the trials of noblemen, now I have said so much on that head, I shall observe, they were carried on in two different methods. Either the accused person was tried in parliament, and then all the temporal lords had voices, or he was tried by a jury of peers; that is the king appointed twenty-four noblemen for that purpose: A law that has proved fatal to many noblemen, who happened to fall under the displeasure of the court. A commoner hath a right to prevent the sheriffs returning a jury to try him, if he can shew a just exception to the sheriff; and after the return is made, he can challenge a certain number for causes known only to himself, and as many more as he can prove sufficient matter of exception to. Such care did the law take of the lives of the commons, but no exception lay for a peer to the king's return. The law would not suppose the least partiality in him, even in his own cause; neither would it suspect that a peer could be biassed by any consideration from doing strict justice, and therefore no challenge lay against him for any cause, however strong and notorious; and the same confidence is the reason why they give their votes, guilty or not guilty, not upon their oaths, but upon their honours.

I CAN scarce imagine that this method of trial could have prevailed in the times of the great power of the barons, when they often made the crown to totter; neither have I been able to discover its beginning. Certain it is that, in the reigns of the Plantagenets most, if not all noblemen, were tried in full parliament; and as certain it is, that, during the reigns of the Tudors

† Gibson, cod. jur. eccles. Angl. vol. 1. p. 143.

dors and Stuarts, the other was universally followed ; infomuch that every nobleman was sure either to suffer or escape, according as the court was at that time affected towards him. At length, after many struggles, about 1695, the bill for regulating trials for high treason and misprision of treason was passed ; one clause of which provides, that on the trial of peers, every lord who hath a right to vote in parliament, shall be summoned, and have a right to vote. Thus was the inconvenience attending the king's naming the jury remedied ; but the law in the other point stands as before, that no peer can be challenged. According to this law have all trials of Irish peers proceeded since that time, though there is no act for that purpose in this kingdom †.

† Privileges of the Baronage, by Selden, ch. 2. p. 1537 of the edition of his works by Wilkins. Coke's institute, second part, p. 49. and 50 ; third part, p. 26.—31.

LECTURE

LECTURE XXII.

The share of the Commons in the Legislature—The Armigeri or Gentry—Knights Bannerets—The nature of Knighthood altered in the reign of James I.—Knights Baronets—Citizens and Burghers—The advancement of the power and reputation of the Commons.

HAVING given a general idea of the lords, and their share of the legislature, it will now be proper to descend, and see the several classes of the lower rank, called *Commons*, and to examine what share or influence they had formerly, or now enjoy, in the government. The commoners may, in general, then, be divided into the *lesser nobility*, or *gentry*, and the others, whom, for distinction sake, I shall call the *lower commons*. For although, since the reign of Henry the Eighth, many men of the best families, and some descended from the nobility, have engaged in commerce, and thereby brought lustre to that order of men, before that time all persons engaged in trade were held in as much contempt by the gentry of England, as they are at present, by those of any nation; and a gentleman who employed himself in hunting, or perhaps serving the king, or some great lord, was looked upon to have degraded himself.

THE gentry were called *Armigeri*, because they fought on horseback, in compleat armour, covered from head to foot; whereas the infantry's defensive arms were of a flighter kind, and no compleat covering. But we are not to imagine that all who fought on horseback compleatly armed, were gentry; for, in order to compleat their squadrons, men of the lower ranks, who, by their strength of body, and military skill, were capable of service, were admitted, but this did not make them gentlemen. Hence, in our old histories, we find the *knights and esquires*, that is, the real gentry, carefully distinguished from the *men at arms*. The peculiar privilege of the gentry was the bearing on their shields certain marks, to distinguish them from each other, and the men at arms called *Coats of Arms*. At first they were personal privileges, and not inherent in the blood, and the marks and re-

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wards of some personal act of bravery performed by the bearer ; so we find in the romances, that a new knight was to wear plain white, until, by some exploit, he merited a mark. The general opinion is, that they were first introduced at the time of the crusades, which I believe is pretty just, at least with respect to our country : for the imperial crown of England had no arms before the conquest. The Norman kings bore the arms of Normandy, *two leopards passant*, to which Richard the First added that of Guienne, another leopard passant, and so composed this English coat, in which, among other alterations, the leopards have since been changed to lions †.

FOR the further encouragement of valour, these marks became transmissible to heirs, not to the eldest son only, as lands, but to all the sons ; saving that the younger were to take some addition, for distinction sake. While these coats were granted by the king alone, and that for real service done, and consequently were not too common ; and while the custom of wearing compleat armour remained, and the office of high constable (the judge in such matters) continued, the gentry were very curious in preserving these distinctions, and vindicating them from usurpation. But as the military disposition of our gentry hath greatly subsided since the loss of the provinces in France, and the kings at arms have assumed the power of giving coats, nicety in these respects hath long since expired ; and now, as in a commercial country, especially, it should be, education and behaviour are sufficient criterions of a gentleman.

I SHALL therefore say no more of them, as distinguished from the rest of the commonalty, but observe, that of these there are two ranks, *knight*s and *esquire*s, or gentlemen. For though we now make a distinction between these two last, the old law knew none, nor is it now a misnomer, in a writ of pleadings, to stile an esquire a gentleman, or the contrary. The holding of a knight's fee did not make a man of that order, but there were particular ceremonies required for the purpose. For the original design of the institution of *dubbing knights*, was that, after a person had, by performing military exercises, shewn that he had properly accomplished himself, and was capable of that honourable service in the field, in his proper person,

† Spelman, voc. Armiger. Du Cange, voc. Armigiri.

son, he should, by a public solemnity, be openly declared so. No wonder, then, that the highest nobility, the sons of kings, nay kings themselves, thought this title an addition to their dignity; as it was then an infallible proof, that they had not degenerated from the virtue of their ancestors †.

BUT among knights there were some of a more distinguished kind (I do not mean to speak of particular orders, such as those of the garter and others) called *Bannerets*, as knights in general were made, upon their proving themselves by exercises capable of service. These were never made but for an actual exploit in war, and then were dubbed with great solemnity under the royal banner. Their distinction was bearing a little banner, annexed to the wooden part of their lance, adjoining the iron point; as, originally, every man who had a whole knight's fee, or the amount thereof in parts of fees, was obliged to serve in person, and was not allowed a proxy, but in cases of necessity every such person was obliged to appear upon the king's summons, to shew himself qualified, and to receive the order of knighthood. This power continued in the king, even after the military tenants were discharged of personal attendance on sending another, or paying escuage, and came to be considered as a profitable fruit of the king's feignory, and was frequently used as an expedient to raise money, by obliging the unqualified, or those who had no mind to the expence or fatigue of attending, to compound ‡.

THIS right of composition was established by act of parliament, the first of Edward the Second, which likewise fixes the estate the persons summoned must have at twenty pounds a year, the quantity of a knight's fee; twenty pounds a year was indeed the valuation of a knight's fee at the time of the conquest, but by change of times, in Edward the Second's reign, it may well be esteemed forty; so that by this act a man who had half a knight's fee was liable to be summoned. This was one of the unhappy means made use of by king Charles the First to procure money when he quarrelled with his parliament. He was sensible, indeed, of a difference in the value of money, and therefore summoned none but such as had forty pounds a-year; but had he paid due attention to its real rise, he should have summoned

† Selden, tit. hon. part 2. ch. 5. § 33. Camden's introd. to his Britan, 242.

‡ Selden, tit. hon. part 2. ch. 5. § 39.

summoned none under an hundred and twenty. For in Edward's reign a pound in money was a real pound in silver, whereas in Charles's, it was but a third part, and so the proportion was to sixty pound sterling, and sixty more is the least rise that can be allowed for the improvements in the value of lands, by the intermediate increase of commerce. No wonder, therefore, that his people looked upon it as an unsupportable grievance. Accordingly, in the 17th of his reign, the act of Edward the second was repealed, and in Ireland, it vanished with the tenures on which it depended †.

THE great change in the nature of knighthood happened in the reign of James the First. The Plantagenets never created any persons such but with a view to military merit, except their judges. The Tudors extended it to persons who had served them well in civil stations, but so sparingly, and to persons of such evident merit, that it still was an encouragement to those that deserved well of the public. But James, who had a passion for creating honours, poured forth his knighthoods, without regard to desert, with so lavish an hand, confirming them for money frequently on wealthy traders, and others without any apparent public merit, that thereby, as also by creating an order of hereditary knights, called *baronets*, a knighthood soon lost the badge of merit it before had carried.

THE occasion of creating baronets was this. On the escheat of the six counties in Ulster, they were planted with colonies of Scotch and English; and, as it was necessary to support a standing army there, for some years after, for the defence of the infant settlements, and money was wanting for that purpose, as, in that reign, it always was for every other, this scheme of creating an order of hereditary knights, to take place after the barons, was fixed upon for that purpose. At first it had some aspect towards military service, for each of them was obliged to maintain so many soldiers in the plantation, for a limited time; and to make the honour more valuable, and to get the better terms for it in the first plan, it was provided, that no more than two hundred should be originally created; and when any of them failed, no new ones to be created in their room. But it was soon seen that these new knights, when they had once attained their dignities, might not duly perform the services they engaged for. The maintaining the soldiers,

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therefore,

† Spelm. reliq. differt. de milite. Coke's inst. part 2. p. 593.

therefore, was commuted into a sum paid to the king, who undertook to do it; and had he been a good œconomist, it would have been a prudent precaution, but whatever sums he could lay his hands on were always at the mercy of his reigning favourite. He was, therefore, obliged to depart from his intended limitation, and to exceed his number; and yet, after all, the service was not done so well as it should have been. His successors have followed his example, in adding to the number, which now is certainly unlimited †.

NEXT to the gentry, or military order, in estimation among the northern nations stood the *citizens* and *burghers*, that is, the trading part of the nation, whether merchants or artificers. These were for some ages held in a very low light, none of the conquerors or their descendants applying themselves to such occupations. They were, indeed, at first, allowed certain privileges and enjoyed their own laws, under the inspection of magistrates appointed by the king, known by the name of *Præpositi*, *Provosts*, or some other equivalent title. But these liberties did not last long. The turbulent temper of the times, the frequent competitions for the throne, and the many rebellions of the great lords, occasioned the towns and their inhabitants to be taken in war, one after another; and the persons so taken, were, by the prevailing *Jus Gentium* of these ages reduced to servitude; not, however to a condition so low as the *villeins*, who were, properly, the slaves of those people, and had no property but at the will of their lords. However it is, no state, except one absolutely barbarous, could subsist without artizans; and as commerce is the parent of wealth, and as neither it, nor arts, could thrive where property is not, in some sort, secure, the lords were in some degree, by their own interest, obliged to relinquish to these people the seizing of their goods at pleasure, as they practised towards their villeins, and to leave them at liberty to make regulations among themselves for the benefit of trade ‡.

THUS far, then, they were free, but their servitude consisted in their being liable to taxes, or *taillages*, at the will of the lords, who, if they were wise, laid on such only as they could well bear; but miserable was their

† Selden, tit. hon. part 2. ch. 5. § 46. Cotton's posthumous works.

‡ Madox, Firma Burgi, ch. 1.

their condition when they fell into the hands of one who was needy and rapacious; for, then, they were often fleeced, even to ruin and depopulation. This induced the wiser lords, who saw the consequences, and how much the arbitrary exertion of such powers must, in the end, hurt themselves, to restrain their own powers; and, by degrees, by granting them *charters*, to emancipate them. They formed them into *bodies corporate*, confirmed the right of making *bye-laws*, which had been permitted them, and granted them other privileges, or *franchises*, as they called them, from their being infranchised, in derogation to former regal or seignoral rights. But for their total freedom they were indebted to parliament, which, seeing the bad use king John made of his right in this kind, provided thus in Magna Charta, *Civitas London habeat omnes libertates suas antiquas, & consuetudines suas. Præterea volumus & concedimus, quod omnes aliæ civitates, burgi, & ville, & barones de quinque portibus, & omnes alii portus, habeant omnes libertates & liberas consuetudines suas.* And another chapter restrains the king from laying new and evil tolls, and confines him to the ancient customs †.

HITHERTO, however, the citizens and burgesses were no part of the body politic, and were not represented in parliament. But as, with their security, their wealth and consequence increased, about, or before the year 1300, they were admitted to that privilege; that they might, in conjunction with the knights of shires, be a check on the overgrown power of the mighty lords; and about that time also the same privilege was allowed to this class of people in the other nations of Europe also. This right was confirmed, and so I may say, the *house of commons*, in its present condition, formed by the statute of the thirty-fourth of Edward the First. *Nullum tallagium vel auxilium, per nos vel heredes nostros, in regno nostro ponatur, seu levetur, sine voluntate & assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, & aliorum liberorum communium de regno nostro;* where we see, not only the burgesses, but free yeomen also had representatives, namely, by their voting along with the knights of the shires, according to the maxim of that wise prince, *Quæ ad omnes pertinent, ab omnibus debent tractari* †.

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† Madox, *Firma Burgi*, ch. 2. Ruffhead, vol. 1. p. 4.

‡ Ruffhead, vol. 1. p. 156.

HAVING come to the constitution of the house of commons as it stands at present, it will not be amiss to look back, and see how far its present form agrees with, or differs from the feudal principles. These principles, we have seen, were principles of liberty; but not of liberty to the whole nation, nor even to the conquerors; I mean, as to the point I am now upon, of having a share in the legislation. That was reserved to the military tenants, and to such of them only as held immediately of the king. And the lowest and poorest of these also, finding it too burthensome to attend these parliaments, or assemblies, that were held so frequently; soon, by disuse, lost their privileges; so that the whole legislature centered in the king, and his rich immediate tenants, of his barony. And it is no wonder the times were tempestuous, when there was no mediator, to balance between two so great contending powers, and were it not that the clergy, who, though sitting as barons, were in some degree a separate body, and had a peculiar interest of their own, performed that office, sometimes, by throwing themselves into the lighter scale, the government must soon have ended either in a despotical monarchy, or tyrannical oligarchy.

SUCH were the general assemblies abroad in the feudal countries, but such were not strictly the *wittenagemots* of the Saxons, for their constitution was not exactly feudal. I have observed that the most of their lands were allodial, and very little held by tenure. The reason I take to be this: On their settlement in Britain they extirpated, or drove out, the old inhabitants, and therefore, being in no danger from them, they were under no necessity of forming a constitution compleatly military. But then those allodial proprietors being equally freemen, and equal adventurers with these who had lands given them by tenure, if any in truth had such, they could not be deprived of their old German rights, of sitting in the public assemblies. From the old historians, who call these meetings *infinita multitudo*, it appears that they sat in person, not by representation†.

THIS constitution, however, vanished with the conquest, when all the lands became feudal, and none but the immediate military tenants were admitted. We find, indeed, in the fourth year of William the First, twelve
men.

† Gurdon's history of Parliament. Tyrrel's introduction to his history. L. L. Anglo-Saxon, ap. Wilkins.

men summoned from every county, and Sir Matthew Hale will have this to be as effectual a parliament as any in England †; but, with deference to so great an authority, I apprehend that these were not members of the legislature, but only assistants to that body. For if they were part thereof, how came they afterwards to be discontinued till Henry the Third's time, where we first find any account of the commons? The truth seems to be, that they were summoned on a particular occasion, and for a purpose that none but they could answer. On his coronation he had sworn to govern by Edward the Confessor's laws, which had been some of them reduced into writing, but the greater part were the immemorial custom of the realm; and he having distributed his confiscations, which were almost the whole of England, into his follower's hands, who were foreigners, and strangers to what these laws and customs were, it was necessary to have them ascertained; and, for this purpose, he summoned these twelve Saxons from every county, to inform him and his lords what the antient laws were. And that they were not legislators, I think appears from this, that when William wanted to revive the Danish laws, which had been abolished by the Confessor, as coming nearer to his own Norman laws, they prevailed against him, not by refusing their consent, but by tears and prayers, and adjurations, by the soul of Edward his benefactor.

THUS William's laws were no other than the Confessor's, except that by one new one, he dextrously, by general words, unperceived by the English, because couched in terms of the foreign feudal law, turned all the allodial lands, which had remained unforfeited in the proprietor's hands, into military tenures. From that time, until the latter end of Henry the Third's reign, our parliaments bore the exact face of those on the continent in that age; but then, in order to do some justice to the lesser barons, and the lower military tenants, who were entitled by the principles of the constitution to be present, but disabled by indigence to be so in person, they were allowed to appear by representation, as were the boroughs about the same time, or soon after. The persons entitled to vote in these elections for knights of the shire, were, in my apprehension, only the minor barons, and tenants by knight service, for they were the only persons that had been
omitted,

† History of the common law of England, p. 107.

omitted, and had a right before, or perhaps with them, the king's immediate socage tenants *in capite*.

BUT certain it is, the law that settled this had soon, with regard to liberty, a great and favourable extension, by which all freemen, whether holding of the king mediately or immediately, by military tenure or otherwise, were admitted equally to vote; and none were excluded from that privilege, except villeins, copy-holders, and tenants in antient demesne. That so great a deviation from the feudal principles of government happened in so short a time, can only be accounted for by conjecture. For records, or history, do not inform us. I shall guess then, that the great barons, who, at the end of Henry the Third's reign, had been subject to forfeiture, and obliged to submit, and accept of mercy, were duly sensible of the design the king had in introducing this new body of legislators, and sensible that it was aimed against them, could not oppose it. But, however, they attempted, and for some time succeeded to elude the effects of it, by insisting that all freemen, whether they held of the king, or of any other lord, should be equally admitted to the right of the representation.

THE king, whose profession was to be a patron of liberty, Edward the First, could not oppose this; and as he was a prince of great wisdom and foresight, I think it is not irrational to suppose, that he might be pleased to see even the vassals of his lords, act in some sort independently of them, and look immediately to the king their lord's lord. The effect was certainly this, by the power and influence their great fortunes gave them in the country, the majority of the commons were, for a long time, more in the dominion of the lords than of the crown; though, if the king was either a wise or a good prince, they were even then a considerable check upon the too mighty peers.

EVERY day, and by insensible steps, their house advanced in reputation and privileges and power; but since Henry the Seventh's time, the progress has been very great. The increase of commerce gave the commons ability to purchase; the extravagance of the lords gave them an inclination, the laws of that king gave them a power to alienate their intailed estates; insomuch that, as the share of property which the commons have is so disproportionate

proportionate to that of the king and nobles, and that power is said to follow property, the opinion of many is, that, in our present situation, our government leans too much to the popular side; while others, though they admit it is so in appearance, reflecting what a number of the house of commons are returned by indigent boroughs, who are wholly in the power of a few great men, think the weight of the government is rather oligarchical†.

† Biblioth. polit. dial. 6, 7, 8. Hume, vol. 1.

LECTURE

LECTURE XXIII.

The privilege of voting for Knights of the Shire—The business of the different branches of the Legislature, distinct and separate—The method of passing laws—The history and form of the legislature in Ireland.

THE house of commons growing daily in consequence, and the socage tenants having got the same privilege of voting for the knights of the shire as the military ones, it naturally followed, that every free person was ambitious of tendering his vote, and thereby of claiming a share in the legislature of his country. The number of persons, many of them indigent, resorting to such elections, introduced many inconveniences, which are taken notice of, and remedied by the statute of the eighth of Henry the sixth chapter the seventh which recites, that of late “ elections of knights had
 “ been made by very great, outrageous, and excessive numbers of people of
 “ which the most part was of people of small substance, and of no value,
 “ whereof every one of them pretended a voice equivalent with the most
 “ worthy knights and esquires, whereby manslaughter, riots, batteries, and
 “ divisions among the gentlemen and other people of the same counties
 “ shall very likely rise and be, unless convenient and due remedy be pro-
 “ vided in this behalf;” and then it provides that, “ no persons should
 “ have votes, but such as have lands or tenements to the value of forty
 “ shillings a year above all charges.” And so the law stands at this day, though by the change in the value of money, by the spirit of this statute, no person should have a vote that could not dispend ten pounds a year at least. Such a regulation, were it now to be made, would, certainly, be of great advantage both to the representers and represented; but there is little prospect of its ever taking place: And if it should be proposed, it would be looked upon as an innovation, though in truth, it would be only returning to the original principles of the constitution†.

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† Ruffhead, vol. I. p. 544.

OUR legislature, then, consisting of three distinct parts, the king, lords, and commons, in process of time, each of them grew up to have distinct privileges, as to the beginning particular businesses. Thus all acts of general grace and pardon take their rise from the king; acts relative to the lords and matters of dignity, in that house; and the granting of money in the commons. How the commons came by this exclusive right, as to money matters, is not so easy to determine. Certain it is that, originally, the lords frequently taxed themselves, as did the commons the commonalty, without any communication with each other; but afterwards, when it was judged better to lay on general taxes, that should equally affect the whole nation, these generally took their rise in that house which represented the bulk of the people; and this, by steadiness and perseverance, they have arrogated so far into a right peculiar to themselves, as not to allow the lords a power to change the least title in a money bill. As to laws that relate not to these peculiar privileges, they now take their rise indifferently either in the lords or commons, and when framed into a bill, and approved by both, are presented to the king for his assent; and this has been the practice for these two or three hundred years past †.

BUT the ancient method of passing laws was different, and was not only more respectful to, but left more power in the crown. The house which thought a new law expedient, drew up a petition to the king, setting forth the mischief, and praying that it might be redressed by such or such a remedy. When both houses had agreed to the petition, it was entered on the parliament-roll, and presented to the king, who gave such answer as he thought proper, either consenting in the whole, by saying, *let it be as is desired*, or accepting part and refusing or passing by the rest, or refusing the whole by saying, *let the ancient laws be observed*, or in a gentler tone, *the king will deliberate*. And after his answer was entered on the roll, the judges met, and on consideration of the petition and answer, drew up the act, which was sent to be proclaimed in the several counties ‡.

LORD Coke very justly observes that these acts drawn up by men, masters of the law, were generally exceedingly well penned, short, and pithy.

E. e striking.

† Spelman, voc. Parliamentum. Hales on Parliaments. Ellys on Temporal Liberty.

‡ Elfringe, on the method of passing bills in Parliament. Gurdon's hist. of Parliament.

striking at the root of the grievance, and introducing no new ones ; whereas the long and ill penned statutes of later days, drawn up in the houses, have given occasion to multitudes of doubts and suits, and often, in stopping one hole, have opened two. However, notwithstanding this inconvenience, there was good cause for the alteration of method. The judges, if at the devotion of the court, would sometimes, make the most beneficial laws elusory, by inserting a salvo to the prerogative, though there was none in the king's answer ; whereas, by following the present course, the subjects have reduced the king to his bare affirmative or negative, and he has lost that privilege, by the diffuse of petitions, of accepting that part which was beneficial to himself, and denying the remainder†.

I HAVE the rather mentioned this ancient practice of making laws, because it shews how inconsistent with our constitution is that republican notion, which was broached by the enemies of Charles the First, that the king, by his coronation oath, swearing to observe the laws *quas vulgus elegerit*, was obliged to pass all bills presented to him, and had no negative. The meaning, certainly, only extended to his observation of the laws in being. For if the words were to be construed of future propositions, and in the sense that those people would put upon them, the lords also, as well as the king, must be deprived of their power of dissent, and so indeed, it appears, they expounded it ; for when the lords offended them, by refusing the trial of the king, they consistently enough with the maxim they had established, turned them out of doors.

BUT though such as I have mentioned is the constitution of the English parliament, the form of the legislature in this kingdom hath been for above two hundred and sixty years very different, the nature of which, and the causes of its deviation from its model, it is proper every gentleman of this country should be acquainted with. In the infancy of the English government in Ireland, the chief governors were generally chosen by the king out of the lords of the pale, the descendants of the first conquerors, both as they were better acquainted with the interest, and more concerned in the preservation of the colony, and also as, by their great possessions, they were better enabled to support the dignity of the place, whose appointments, the king's

† Ruffhead's preface to the statutes.

king's revenue here being inconsiderable, were very low. These governors, however, though men of the greatest abilities, and of equal faithfulness to the crown, were not able to preserve the footing the English had got soon after the conquest; but were every day losing ground to the natives, down to the reign of Edward the Third, which is generally, and, I believe, justly, attributed to the negligence of the English lords, who, by intermarriages, had acquired great estates in Ireland. The power of these lord lieutenants was, in one respect, likewise exorbitant, namely, in giving consent to laws without ever consulting his majesty, a power, perhaps, necessary at first, when the country was in a perpetual state of war, and its interest would not brook delays, but certainly, both for the sake of king and people, not fit to be continued.

It was natural, therefore, for the king, who found himself ill served, to change hands, and to entrust this exorbitant power with persons not estated in the country, and whose attachment he could confide in; and accordingly, from that time, we find natives of England generally appointed to the government, to the great discontent of the Irish lords, who looked upon themselves as injured by the antient practice not being continued. This discontent was farther inflamed by a very extraordinary step, which this otherwise wise and just king was prevailed upon to take, and which first gave rise to that famous distinction between the English by blood, and the English by birth. This king, and his father Edward the Second, had granted great estates, and extensive jurisdictions to many Irish lords of English blood, for services pretended to have been done, many of which, it is probable enough, as the king alledged, were obtained by deceit and false representation; and had he contented himself with proceeding in a legal course, by calling these patents in by *scire facias*, and vacating them upon proof of the deceit, no person could have complained; but he took a very different method, as appears from the writ he thought proper to issue on that occasion. *Quia plures excessivæ donationes terrarum, tenementorum & libertatum, in terra Hiberniæ, ad minus veracem & subdolum suggestionem potentium, tam per Edward II. quam per regem nunc factæ sunt, rex delusorias hujusmodi machinationes volens elidere, de concilio peritarum sibi assistentium, omnes donationes terrarum, tenementorum, & libertatum prædictarum duxit revocandas, quousque de meritis personarum, de causis & conditionibus donationum prædictarum fuerit in-*

formatus, & ideo, mandatum est justiciariis regni Hiberniæ, quod omnia terras terementa & libertates predicta per dictos regis justiciarios aut locum tenentes suos quibuscunque personis facto scisire facias. This hasty step alienated the English Irish from the king and his advisers, and though, after a contest of eleven years, the king annulled this presumption, the jealousy continued on both sides, and the Irish of English blood, were too ready to follow the banners of any pretender to the crown of England.

IN the reign of Henry the Sixth, that weak prince's ministers, jealous of the influence of Richard duke of York in England, and of his pretensions to the crown, constituted him governor of Ireland; than which they could not have done a thing more fatal to their master's family, or to the constitution of this kingdom, as it turned out in the sequel; for to induce him to accept it so eager were they to remove him from England, they armed him almost with regal powers. He was made lieutenant for ten years, had all the revenue, without account, besides an annual allowance from England; had power to farm the king's lands, to place and displace officers, and levy soldiers at his pleasure. The use the duke made of his commission was to strengthen his party, and make Ireland an asylum for such of them as should be oppressed in England; and for this purpose passed an act of parliament, reciting a prescription, that any person, for any cause, coming into the said land, had used to receive succour, tuition, supportation, and free liberty within the said land, during their abiding there, without any grievance, hurt, or molestation of any person, notwithstanding any writ, privy seal, great seal, letters missive under signet, or other commandment of the king, confirming the said prescription, and making it high treason in any person who should bring in such writs, and so forth, to attach or disturb any such person.

THIS act, together with the duke's popularity, and the great estate he had in this kingdom, attached the English Irish firmly to his family, inasmuch that, in Henry the Seventh's reign, they crowned the impostor Lambert Simnel, and were afterwards ready to join Perkin Warbeck; and by this act of the duke of York's they thought to exculpate themselves†. But when

† Kennet's English Historians, vol. 2. p. 587, 606. Carte, vol. 2. p. 828. Hume, vol. 2. and 3.

when that king had trodden down all opposition, he took advantage of the precarious situation they were in, not only to have that act repealed, and to deprive his representatives there from passing laws *rege inconsulto*, but also to make such a change in the legislature, as would throw the principal weight into his and his successors hands; and this was by the famous law of Poyning's†. By former laws a parliament was to be holden once a year, and the lords and commons, as in England, were the proposers. This act, intended to alter these points, gave occasion to many doubts; and indeed, it seems calculated for the purpose of not disclosing its whole effect at once. Its principal purport, at first view, seeming to be intended to restrain the calling the parliament, except on such occasions as the lord lieutenant and council should see some good causes for it, that should be approved by the king. The words are, that “ from the next parliament that shall be holden by the king's commandment and license, no parliament be holden hereafter in the said land, but at such season as the king's lieutenant and council there first do certify the king, under the great seal of that land, the causes and considerations; and all such acts as to them seemeth should pass in the same parliament, and such causes, considerations, and acts, affirmed by the king and his council to be good and expedient for that land, and his license thereupon, as well in affirmation of the said causes and acts, as to summon the said parliament under his great seal of England had and obtained; that done, a parliament to be had and holden after the form and effect before rehearsed, and any parliament holden contrary to be deemed void ‡.

THE first and great effect of this act was, that it repealed the law for annual parliaments, and made the lord lieutenant and council, or the king who had the naming of them, with his council of England, the proposer to the two houses of the laws to pass, at least of those that should be so devised before the meeting of parliament. But the great doubt was, as there were no express words depriving the lords and commons of their former rights, whether, when the parliament was once met, they had not still the old right of beginning other bills, or whether they were not restrained to the acts so certified and returned. By the preambles of some acts, soon after

† Lord Bacon's life of Henry VII. ap. Kennet, vol. 2. p. 612.

‡ Irish statutes, vol. 1. p. 23. Coke, 4. instit. chap. 76.

after made, expressing that they were made at the prayer of the commons in the present parliament assembled, one would be inclined to think that the commons, after the assembling the parliament, had proposed these laws. Certain it is, the latter opinion, supported by the ministers of the king and his lawyers, gained ground. For, in the twenty-eighth of Henry the Eighth's reign, an act was made suspending Poyning's law with respect to all acts already passed, or to be passed in that parliament; the passing of which act was certainly a strong confirmation of what was before doubtful against the house of lords or commons in Ireland, whether they could bring in bills different from those transmitted by the council, since here they both consented to the suspension of the act, to make valid the laws they had passed or should pass in that parliament, without that previous ceremony †.

BUT in the reign of Philip and Mary, by which time this opinion, before doubtful (for so it is mentioned in the act then made) was, however, to be maintained, and strengthened, as it added power to the crown. The act we at present live under was made to prevent all doubts in the former, which was certainly framed in words calculated to create such doubts, to be extended in favour of the prerogative. This provides, that as many causes and considerations for acts not foreseen before, may happen during the sitting of parliament, the lord lieutenant and council may certify them, and they should pass, if they should be agreed to by the lords and commons. But the great strokes in this new act were two, the first explanatory of part of the former in Henry the Seventh's reign, that is, that the king and council of England should have power to alter the acts transmitted by the council of Ireland; secondly, the enacting part, that no acts but such as so came over, under the great seal of England, should be enacted; which made it clear, that neither lords or commons in Ireland had a right to frame or propose bills to the crown, but that they must first be framed in the privy council of Ireland, afterwards consented to, or altered by the king, and the same council in England, and then, appearing in the face of bills, be refused or accepted *in toto* by the lords and commons here †.

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† Irish Statutes, p. 48.

‡ Irish Stat. vol. I. p. 143.

It is true, that both lords and commons have attempted, and gained an approach towards their antient rights of beginning bills, not in that name, but under the name of *Heads of Bills*, to be transmitted by the council; but as the council are the first beginners of acts of parliament, they have assumed a power of modelling these also. The legislature of Ireland is, therefore, very complicated. First, the privy council of Ireland, who, though they may take the hint from the lords or commons, frame the bill, next the king and council of England, who have a power of alteration, and really make it a bill, unalterable, by sending it under the great seal of England; then the two houses of lords and commons, who must agree in the whole, or reject the whole; and, if it passes all these, it is presented to the king for his assent; which indeed is but nominal, as it was before obtained.

LECTURE

LECTURE XXIV.

Villénage—The Servi in Germany, mentioned by Cæsar and Tacitus, the predecessors of the Socmen or socage tenants in the feudal monarchy—Villeins in grofs and villeins belonging to the land of the Lord—The condition of villeins—The different ways by which a man may become a villein—The means by which villénage or its effects may be suspended.

I Now proceed to the lowest class of people that were in a feudal kingdom, who, indeed, were not any part at all of the body politick, namely *copyhold tenants, tenants in ancient demesne, and villeins*, on which I shall not much enlarge as villénage is worn out both in England and Ireland; and though the two former are common in England, yet there are none such in this kingdom. I shall begin with *villénage*, though the lowest kind, as I apprehend the other two by the tacit consent of their lords, have for ages, from being villeins acquired the privileges that distinguished them from such.

IN a former lecture I gave it as my opinion, that, while the nations of the north continued in Germany, there was no such order of men among them; but that the persons among those people who were called *servi* by Cæsar and Tacitus, were the predecessors of the *socmen* or *socage tenants* in the feudal monarchy; though they certainly had not all the privileges the socmen acquired, and that, after their settlements in their conquests, this rank was introduced, and formed out of their captives taken in war, in imitation of the Roman slaves. In this I am strongly supported by my lord Coke, who quotes Bracton, Fleta, and the Mirror, concerning their origin, to the following purpose: “The condition of villeins who passed from freedom in
“to bondage in ancient time grew by the constitution of nations, and not
“by law of nature; in which time all things were common to all, and by
“multiplication of people, and making proper and private those things
“that were common, arose battles. And then it was ordained by constitu-
“tion

“ tion of nations (he means by the tacit consent of civilized nations) that
 “ none should kill another, but that he that was taken in battle should re-
 “ main bond to his taker for ever, and he to do with him, and all that should
 “ come of him, his will and pleasure, as with his beast or any other cattle,
 “ to give, or to sell, or to kill. And after, it was ordained for the cruelty
 “ of some lords, that none should kill them, and that the life and mem-
 “ bers of them, as well as of freemen, were in the hands and protection of
 “ kings, and that he that killed his villein should have the same judgment
 “ as if he had killed a freeman †.” This, it falls also to be observed, is the
 very account the Roman civil law gives of the original of servitude.

VILLENAGE, therefore, was a state of servitude, erected for the purpose of doing the most ignoble, laborious, and servile offices to the lord, according to his will and pleasure, whensoever called upon; such as the instances *Littleton* gives, of carrying and recarrying dung, and spreading it on his lord's land. *Bracton*, thus defines it *purum villenagium est, a quo prestatum servitium incertum indeterminatum, ubi scire non poterit vespere quale servitium, fieri debet mane, viz. Ubi quis facere tenetur quicquid ei preceptum fuerit.* So the most honourable service, the military one, was free, and its duties uncertain. The next in rank, the socage was free, and its duties certain. This, the lowest, was servile, and its duties uncertain ‡.

OF those villeins there were two kinds, villeins belonging to the person of the lord and his heirs, which our law calls *villeins in gross*, and *villeins belonging to the land of the lord*, and who, in consequence of the lands being aliened, went over to the new acquirer, without any special grant. These were in the Roman law, called, *servi adscriptitii glebæ*, that is, slaves annexed to the soil, and by our lawyers *villeins* regardant to a manor; for manors were, antiently, thus distributed. After the lord had reserved to himself a demesne contiguous to his castle, sufficient for the purpose of his house and his cattle, the remainder was generally divided into four parts; the first for settling such a number of military tenants as might always more than suffice to do the service due to the superior lord; the second for socage tenants, to plow the lord's demesne, or, in lieu thereof, to render corn, cattle, or other things as stipulated by him; the third for villeins, for the purpose of

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† Coke on *Littleton*, lib. 2. ch. 11. § 172.

‡ *Bracton*, lib. 4. cap. 28.

carrying dung, felling timber, making inclosures, and other servile offices, as required by the lord at his pleasure ; and the last share of land, was called the *waste*, or *common*, being generally woodland, and coarse pasture, the wood for the lord's hunting, for supplying him with timber at his pleasure, and the tenants with reasonable *estovers* as they are called, out of the woods, in those three articles, *housebote* for the support of their houses, *ploughbote*, for their utensils of husbandry, and *firebote*, for fuel ; and the pasture for the cattle of all the tenants, military, socage, and villeins in common. This was the usual method of distribution, not however into equal parts, for the demesne and waste were generally much the largest, nor always into the same number of parts, for this varied according to the quantity and quality of the land, whether better or worse, and the military service reserved, whether lighter or heavier †.

FROM this distribution we may see that, in most manors, there was land which, having been originally set apart to the use of the villeins, was called villein-land, which retained its name, and was liable to the same name, and servile services, though it had come into the hands of freemen, who, consequently, though free, might hold lands in villenage, and be obliged to do the same uncertain services as a villein was. Few freemen however we may suppose, would submit to such uncertain burthens, and therefore when they took such lands, the lord generally reduced the service to a certainty, and this tenure, because of the low nature of the duties they performed, was also, though abusively, called *villenage*. But speaking with propriety, it was socage, the tenant being a freeman, and the services certain. Certainty of service being, as I have often mentioned, the grand characteristic that distinguished the socage tenure from the military above it, and from villenage below it.

LET us now see what kind of property this rank of people had in their persons, their lands and their chattles ; for from what has been already observed, some kind of property they must have had, or they could not have performed the services. And the first rule is, that, with respect to every person but his lord alone, a villein was perfectly a freeman. His life, his liberty, his property, were equally protected by the law, as those of any other person.

† Reliq. Spelm. 251. Barington on the statutes 270. et seq. Gurdon's hist. of Court-Baron and Court-Leet, p. 573.

son. He could acquire, he could alien property, he could be plaintiff in all kinds of actions whatsoever; but if defendant he might plead his being a villein. As to his lord, his case was very different. His life, indeed, his liberty, his limbs, were under the protection of the king; and if in these he was injured by his lord, the lord should be punished at the suit of the king, as in the case of any other subject, but not at his own suit. However, there was two excepted cases, where the law (for they most certainly punished the two detestable crimes of murder and rape) gave a villein actions against the lord, namely an *appeal*, that is an accusation in his own name of murder, where the lord had killed the villein's ancestor; and appeal of rape, where the lord had ravished his *neif*, for so a bond woman, or female villein, or *nief*, is called in our law. And here if the lord was found guilty, the villein, or *neif*, were by that judgment manumized for ever. For it would have been a glaring absurdity, to have afterward trusted them in the power of the heir of that lord, whom they had hanged. Neither had a villein, with respect to his daughter, the same power of disposing her in marriage without the lord's consent as he had of his son. And this distinction was founded upon solid reason, for the son of a villein, after his marriage, and his issue, continued in the same plight as he was in before, villeins to the lord; but the daughter, by her marriage, passed into another family, and her issue were either to be freemen, if her husband was free, or villeins to the other lord, if her husband was such; so that the lord had a very important interest in his seeing his villein's daughter married to another villein of his. This previous consent, however, wore out by degrees, and by the custom of particular places, a certain fine was all that the lord could claim for the marriage.

WITH respect to the lands the villein held from his lord, and also as to his chattels, or personal fortune, he was only tenant, or possessor at the will of the lord; for he the lord might resume the one, or take possession of the other whenever he pleased; but in the interim they were the villeins, and he might convert the profits of them to his own use, unless they were also in being and seized; the seizure of them being what made the absolute property in the lord. And the case was the same with respect to purchases, or acquisitions of lands or goods; for before the seizure, or some other public act equivalent thereto, the villein might alien them as well as the goods he had held before at the will of the lord, and the alienation was good against the lord, and the reason of this was undeniable. For it would have put a

total stop to all commerce both of goods and land, if every buyer was obliged, at his peril, to make enquiry, and to take notice whether the seller may not possibly, in truth, be a villein to some one of the many lords in the kingdom; and it would have been highly absurd to allow the lord to seize the lands, or goods in the hands of the purchaser, when he might seize the purchase money likewise in the hands of his villein, the seller; I say it is the seizure, or some other public act equivalent thereto, that vests the property in the lord; for, in all cases, an actual seizure was not possible. A few instances will clear this up †.

IF the villein purchases lands in possession in fee simple, fee tail, life, or years, the lord should, if he had a mind to make them his, enter, and claim them; or if, for fear of danger, he dare not enter, should come as nigh to the lands as he dare, and claim them there. And this was sufficient to vest the estate in the lord, according to the nature of the estate the villein had in it, and to defeat a future purchaser; even though the lord should suffer the villein to continue in the possession. For the purchaser is obliged, at his peril, to take notice of all legal acts of notoriety, done respecting the lands he purchases. But if the villein purchases land not in possession, as suppose a remainder, or reversion, where there is a prior estate for life or lives, or in tail, in another person in being; here the lord cannot enter, for that would be disseizing, and doing wrong to the immediate tenant of the freehold; and if he waited till that estate was spent, and the remainder or reversion was to come into possession, the villein might have aliened them before, and so defeated his lord. He should, therefore, in such case, come to the land, and claim the reversion or remainder, as his villein's purchase. And this act presently is sufficient to vest them, the reversion or remainder in him, and to defeat a future purchaser. So if a villein purchased an advowson, or presentation to a living, where the parson of the church is living, the lord cannot present, which is the proper act to gain possession of the advowson. For the church is full of an incumbent, but he shall come to the church, and claim the advowson as his villein's purchase; and this vests the advowson in him, and will defeat a future alienation by his villein. In the same way with respect to goods; the lord may either seize them, and retain them in his own hands, or may come to the place where they are, and openly claim them before the neighbours, and seize a part of them in the name of the

† Coke on Littleton, lib. 2. chap. 11.

the whole goods his villein *hath*; and this shall vest the property in him, though he leaves the possession still in his villein; and if he adds the words or *may have*, it vests the property of goods after acquired, though it is otherwise of lands.

FROM this power of the lord as to his villein's property, it appears the villein can bring no action relative to property against him; for all such actions, being either to recover the thing itself, or damages for the wrong done, in both cases, it would be useless, and improper. For, inasmuch as the lord had right to take, the taking could be no injury, and to give damages even for a personal injury would be absurd and nugatory, since the lord might immediately, as soon as recovered rightfully, retake them from his villein. Therefore Littleton says, "a villein cannot have an appeal of maim against his lord that hath maimed him †." For, as the law then stood, *maim* was only punishable by fine and imprisonment, at the suit of the king, or by damages, in an appeal of maim, at the suit of the party. Neither could he have an appeal of robbery against him, though that offence, with respect to freemen, was capital; for the lord having a right to take, could not be guilty of robbery. However, there was one excepted case, wherein the lord could not take things out of his own villein's hands, and wherein the villein also might maintain an action against him; but then, in this case, the villein acted not in his own right, but in that of another, *in autre droit*, as our law says, which was when a villein was made an executor. For here he acted not in his own right, but as representative of his testator, for the performance of whose will, and for no other purpose, he had allowed to him this possession against his lord, and this right of action against him.

LET us now see how many different ways a man might be a villein, how many ways the villenage, or its effects, may be suspended, and how many ways it might be totally destroyed.

Now a man might be a villein either by birth, or become such by his own act. With respect to birth, our law considers only the condition of the father, whether free or villein, contrary to the civil law, where the maxim is *pārtus sequitur ventrem*. Our rule seems more agreeable to natu-

ral

† Lib. 2. § 194.

ral reason, as the husband is master of the family, the head of the wife, and supposed, at least, the principal party in the production of the offspring. Yet the Roman law is not therefore to be charged with absurdity, it proceeding on a principle peculiar to itself, namely, that they allowed no matrimony but between free persons; a cohabitation between two slaves, or between a slave and a free person, was called *Contubernium*, not *Nuptiæ*, nor *Matrimonium*; and to such a commerce their law did not give such continuance, or entire credit, as to presume the father to be certain. A free-woman who so far disgraced herself as to cohabit with a slave, they supposed equally guilty with others; and therefore, as the father was uncertain, *in favorem libertatis*, they presumed him a freeman. And, on the contrary, though a freeman cohabited with a slave, that law gave no credit to her constancy, but rather supposed the issue begat by one of her own rank, another slave. But in England, if the father was free or slave, the issue was so; for our law admitting such marriages as good ones, upon the maxim, *whom God hath joined let no man sunder*, gave them an entire credit. What then shall we say was the case of *bastards*, where the father was entirely unknown, and who were *fili nullius*. Some old opinion in England indeed held, that if the mother was a neif, because she was certain, the issue should be a villein; but this doctrine was exploded, and it was settled that, as the child was, by our law, to follow the rank of his father, and who that was, was entirely uncertain, it should be universally presumed in favour of liberty, that the father was a freeman, whatever the mother was. A bastard, therefore, could not be a villein, but by his own act; and how a man could become so I shall next proceed to shew †.

THERE was then but one way for a freeman born to become a villein, I mean in the latter ages, when the practice of making slaves of captives taken in war went into disuse, and that was by his admission and confession. For *volenti non fit injuria* is a maxim of all laws, and in the antient times of confusion, it might be an advantage, at some times, to a poor freeman to put himself, even in this law manner, under the protection of a lord that was both powerful and humane. But so careful was the English law of liberty that it did not allow every confession or admission to conclude against a man's liberty, but such an one only as could not proceed from mistake, inadvertence,

† Littleton, § 187, 188.

advertence, or constraint. The confession must be made in a court of record, and entered on record. Then indeed was it conclusive, for it is a maxim of our law, that there is no averring against a record, that is, charging it, or the contents thereof, with falsehood. For if that could be, property could never receive a final determination, nor a man be certain that the suit that he had obtained might not be renewed against him †.

BUT the law went farther in its precautions, and would not suffer any confession, even in a court of record, to destroy liberty. If a man came voluntarily into such a court, and made an extrajudicial confession, that is where there was no suit depending, and contested in that court, it could not bind him. The confession, to bind, must be made in such a court, and in a suit litigated there; so that there might be no room afterwards for pretending surprize, error, constraint, or terror. Thus, if a stranger brought any action against a man (for if the lord brings any action, except one kind only, against his villein, he the villein, is thereby manumized, as I shall observe hereafter) I say, if a stranger, A, brought an action against B, and B, to bar A, of his action, pleads on record, as he may, that he is villein to C, this confession shall bind him, and he shall be C's villein, though he was in truth a freeman; yea though A, in that very action, had replied that B was a freeman, and had even proved him such: And indeed this was but a just punishment for his fraudulent attempt to deprive A of his action.

AGAIN, if a lord, claiming a man to be his villein, bring the writ called *nativo habendo*, the proper one to prove this fact, that the defendant was his villein, and the defendant confesses himself judicially so to be, he and his issue are bound, though he was free before; or if the defendant, in such case, pleads he is a freeman, and the lord, to prove him his villein, produces the defendant's uncles, or cousins, who swear, that they and their ancestors, from time immemorial, or from a time antecedent to the separation of family, have been villeins to that lord and his ancestors, whatever becomes of the original suit, they themselves thenceforwards are the lord's villeins; and though they were in truth free, it is but a just punishment, as I observed before, for their foul attempt of reducing their kinsman to slavery. However, as we must allow that every man is fond of his own and his posterity's

† Littleton, § 174.

sterity's liberty, we must accordingly believe that these instances of freemens becoming slaves voluntary were very rare, and, that the majority of villeins were such as were so by birth. Before I leave this head, I should observe that, with respect to the issue of men becoming villeins by their own confession, the issue born after the confession alone were bond, as being so born, and that the children born before, retained the liberty they had acquired by their birth.

VILLENAGE could not only be totally destroyed by many means, but also might be suspended for a time, and afterwards revive. The suspension arose from some subsequent obligation the villein, or nief, happened to lie under, which the law considered, and favoured more than the lord's right in his villein, or nief; therefore, if the king made a villein a knight, such a creation, being for the defence of, and to increase the military strength of the realm, and the person obliged to serve accordingly, his state of villenage was suspended, not destroyed. For, if he was afterwards degraded from his order, he became the lord's villein again, so if a villein became a monk professed, now was he obliged to live entirely in his monastery, and spend his time in prayers, and other spiritual exercises, duties inconsistent with his service as a villein; and those being performed to God were preferred to the interest of the lord; but if such monk was deraigned, that is, degraded from his order, and turned out of his monastery, he became a secular man again, and the lord's right revived. But if a villein is made a secular priest, he not being confined to a monastery, nor his whole time dedicated to the service of God, he is still a villein and obliged to attend his lord at all times, when the stated times or occasions of his new duty do not employ him. So if a nief marries a freeman, the right of the husband in his wife, as founded on the law of God and nature, is preferred to the lord's, though prior, which is founded only on the constitutions of nations: She, therefore, is privileged, and a free woman during the coverture; but if the husband dies, or a divorce happens, then is she a nief again. But it may be asked, shall the lord thus, without any fault of, or consent from him, be, by the act of others, deprived, even for a time, of his right in his villein, and the advantage thence arising? I answer, though the law, for the public good, suspended the villenage, it did not leave the lord without redress for the wrong done unto him. For, in the cases of profession and marriage, the lord shall have his action against, and recover the damages he may sustain, from the abbot

abbot who had admitted his villein a monk, or the husband who married his niece; but against the king who has knighted his villein, he cannot have an action, for, according to the principles of the feudal law, to bring an action against the king is a breach of fealty: it is charging him with injustice, and with breaking that mutual bond, whereby he is tied to his vassals as strictly as they are tied to him. But he shall not be without remedy. He shall have his action, and recover damages against those, who by their aid, advice, counsel, or recommendation prevailed on the king to make his villein a knight. Coke mentions two cases more, wherein I cannot say so fully as he says, the *villenage itself* is suspended, as that the *effects* thereof are suspended, as to a certain place; and both these are in honour of the king, one is when a villein escapes from his lord, and has continued for a year and a day in the demesne of the king, doing service to him as his villein. The lord can neither seize him, nor even bring a writ of *nativo habendo* against him while he continues in the royal demesne. The other is where a villein is made a secular priest in the king's chapel. The lord cannot seize him in the presence of the king †.

WE shall next have a more agreeable subject, and by considering the many ways the law of England hath contrived to destroy villenage, have the pleasure of observing its natural bent toward the equal liberty of mankind, and how it rejoiced to shake off the shackles of servitude, even in those days when it admitted it.

† Coke on Littleton, lib. 2. ch. 11.

LECTURE XXV.

The methods invented to destroy villenage—The bent of the law of England towards liberty—Copyhold tenants—Tenants in ancient demefne.

RELATIVE to villenage, the following are the words of the antient judge Fortescue, who wrote a treatise on the grounds of the English law, for the instruction of his pupil, the unfortunate son of the unfortunate king Henry the Sixth. *Ab homine, & pro vitio introducta est servitus; sed libertas a Deo hominis est indita naturæ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertate naturali privatur* *. We are now to see how, and in how many ways, our law favours this natural propensity to liberty. And the first and plainest is a direct enfranchisement, or, as the Romans called it, *manumission*. This, in the ancient times, before writing was common, used to be done, as all their important acts, (for the better preserving them in memory) in great form. *Qui servum suum liberum facit, in ecclesia, vel mercato, vel comitatu, vel hundredo, (that is, the county court or hundred court) coram testibus, & palam faciat, et liberas ei vias, & portas conscribit apertas, & lanceam, & gladium, vel quæ liberorum arma in manibus ei ponat* †. But after the use of writing became common, the method was by the lord's deed (mentioning him to be his villein, and expressly enfranchising him) sealed by the lord's seal, and attested by proper witnesses, as other deeds between freemen should be ‡.

BEFORE I go farther, I should observe the favour of the English laws to liberty in that, by it all manumission, of what kind soever, was absolute and irrevocable. Once a freeman, and ever so; whereas by the civil law, a freedman was bound to many duties towards his patron. A relation between them still subsisted, and if he was guilty of ingratitude, that is, of any of the many offences their law marked as such, he was again to be reduced to slavery.

BUT

* Cap. 42.

† Wilkins, Leg. Anglofax.

‡ *Formulare Anglicanum*, tit. Grants and Manumissions of Villeins.

BUT besides this species of exprefs enfranchisement, there were many implied ones. First, by the act of the lord alone, and others by construction of law, upon the act either of lord or villein. By the act of the lord alone, namely, if he had entered into any solemn certain contract with his villein, giving him thereby either a permanent right of property, or a power to bring an action against his lord. In such cases he was instantly manumized, without exprefs words; for, otherwise, he could not have the benefit of the gift intended, and the lord's act, in such cases, should be construed most strongly against himself. As if the lord gives land to his villein and his heirs, or to him and the heirs of his body, or to him for life; immediately on the giving livery and seizin, which was, as I have often observed, what compleated an estate of freehold, and made it irrevocable, the villein became free. Otherwise he could not enjoy the benefit of the grant, or protect it against his lord.

THE same was the case if the lord gave him any certain property, as a bond for payment of a sum of money, or a yearly annuity, or a lease of lands for years. The villein could not securely enjoy the benefit of the gift, without being able to bring an action against his lord, and consequently being free against him. Yea, though the annuity or lease of land was but for years, the manumission was absolute for ever, and not suspended for the years only; which was different from the cases I put in my last lecture, of villenage being suspended by the act, not of the lord, but another person; but here where the lord himself, by his own act, set him free, though but for a time, he was free for ever. But if the lord gave his villein lands to hold at will; this being of the same nature with the proper holdings of villeins, and the lord having reserved in his own breast a power of ousting whenever he pleased, the villein gaining thereby no certain property, he continued in his former situation.

SECONDLY, a man may be enfranchised without exprefs words, by construction of law, operating on the act either of the lord or villein. If a lord had a mind to dispossess his villein of lands, or of goods, he had a right to enter on the lands, or seize the goods, without ceremony; but if, waving this right, he brought an action against him for them, or if he brought not any action personal against him, but the one of *Nativo Habendo*, the villein

was enfranchised, whether the lord recovered or not, or whether he prosecuted the action or not. For when he omitted the easy remedy the law appointed, and brought his villein into court to defend his right, he admitted him to be a person that could stand in judgment against him, and litigate with him; that is, to be a freeman. But it must be observed this enfranchisement did not commence immediately from the taking out the writ, which was the commencement of the action, but from the appearance of both plaintiff and defendant, and this for the benefit of the lord; for otherwise, as Coke observes, a stranger, by collusion with a villein, might take out an action against him in his lord's name. To which I may add, that the lord might have intended his action against a freeman of the same name with the villein, and the sheriff might have summoned the villein by mistake. In this case it was hard that the lord should suffer. He therefore might, when he saw the villein ready to appear, nonsuit himself, that is, decline appearing; and then the villein could not appear, and therefore was not enfranchised. But if he went on, and suffered his villein to appear, and consequently enabled him to plead against him, he must have abided by the consequences of his own folly, and his nonsuiting himself afterwards could in no sort avail him †.

A VILLEIN might likewise be manumitted by his lord's bringing a criminal action against him, though this was no admission of permanent property in him, or of his capacity of standing in law against him as a freeman; as if the lord brought an appeal of felony, as of murder, or robbery, against him. If he was acquitted he might be enfranchised, because he might be entitled to recover damages for the malicious prosecution, and the danger his life had been in; and damages he could not recover without being a freeman. I say *might* be enfranchised, because he *might* recover damages. For in this case a distinction is to be taken, whether the villein was, before the appeal brought, indicted at the suit of the king for the same offence, or was not. If he was not, the acquittal shewed the prosecution to be malicious, and the villein was entitled to recover damages, and so to be free. But if he had been indicted, there were no grounds to suppose the appeal brought maliciously. The finding the indictment by the grand jury was a presumption of his guilt. The lord had a rational ground for bringing his appeal, and

† Hicckes. differt. epist. p. 13. et seq. Brady's hist. p. 82. Fitzherbert's *natura brevium*, p. 187, 189, 190. Cowell's interpreter, voc. copiehould. Coke on Littleton, lib. 2. chap. 11.

and he had a right to bring it for the punishment of his villein, if guilty. Otherwise he could not have him hanged, for the indictment at the king's suit might not be prosecuted, or the king might pardon. In such case, therefore, there being no malice presumed, the law gave no damages, and consequently no enfranchisement. But the lord's bringing the writ called *Nativo habendo* against his villein, namely, claiming a man to be his, as such, was no enfranchisement, for that would defeat the ends of the suit; and the law allowed the lord a power to seize his villein without further ceremony, it did not precisely compel him to that method only, for his villein might be at too remote a distance, or under the protection of persons too powerful. But if, after appearance, the lord suffered himself to be nonsuited, in this action, it was an enfranchisement.

THE law, likewise, enfranchised in some cases on the act of the villein himself, as if the lord had been found guilty in an appeal of murder, brought by his villein, or of rape by his niece; but these I mentioned in the last lecture, and the reason is apparent.

By all these various ways the number of villeins insensibly diminished, and the number of freemen continued to encrease in every reign; but what gave the finishing stroke to servitude were the confusions occasioned by the two contending houses of York and Lancaster; when the whole kingdom was divided, and every lord obliged, even for his own security, to take part with one side or the other; and when once engaged, necessitated to support his party with his whole force. Villeins were, therefore, emancipated in prodigious numbers, in order to their becoming soldiers. Many of such, also, who had not been formerly emancipated, in those times of distraction, fled for self-preservation to London, and other cities, where, being absent from their lords, they were looked upon as free; and where they generally continued, even after these troubles had ceased, unknown to the heirs of the antient lords; and in consequence, for want of proof of their servitude within fifty years last past, (which was the time of limitation for this action) most of them and their posterity became free. When things afterwards became composed, under Henry the Seventh, many of these persons were by the heirs of their former lords reclaimed, and recovered as villeins, though, undoubtedly, the far greater part escaped undiscovered. But even in those actions

actions that were brought, both judges and juries were very favourable to the persons claimed; the juries out of favour to liberty, and the judges, I presume, following the policy of that reign, one of the great objects of which was the depression of the great lords; to which nothing could more contribute than the lessening the number of the persons who were held in such strict dependance by them, and the profits of whose industry they had right to seize, and to encrease their wealth and their power †.

ANOTHER thing which had, long before that period, lessened their numbers, was the rise of copyhold tenants. These are persons who are said to hold lands *at will, but according to the custom of a manor*, and those arose from the villenage tenants, as I conceive, by the following means. When a succession of mild and humane lords had neglected, for a long time, to seize their villeins goods, or to exact villein service, so that no memory remained of their having made use of such a practice, they came to be considered in another light, and became exempted from that seizure by prescription. For the lord claiming a villein in a *nativo habendo*, must plead, and prove, that he, or his ancestors, had exacted such services, from the person claimed, or his ancestors, otherwise he failed. Therefore, in the case I have mentioned, though a future lord had an inclination to depart from the practice of his predecessors, and revive his rights, he could not recover them for want of proof; and these persons so long indulged, became freemen. However their lands, (they being only tenants at will) might still be resumed, until, at last, they got, likewise, by the same kind of prescription, a permanent right in them also, in the way I now shall relate.

If a lord had given his villein any certain estate, it was, as I before observed, an absolute manumission for ever. But some lords, either in reward for services done, or out of bounty, gave many of those underling tenants, if not an absolute right to their holdings, at least, a fair claim and title to a permanent estate, which, in honour, the lord or his heirs could not defeat, and yet kept them in a particular kind of dependance, between freedom and absolute villenage. But the question was how this was to be done; for if the lord had given him a deed, to assure him the lands, and so entered into a contract with him, he was entirely emancipated. The way was then for the lord to enter into the roll of his court, wherein he kept the

list

† Carte, hist. of England, vol. 2. p. 844. 845. 846.

list of his tenants, that he had given such an one an estate at will, to hold to him and his heirs, or to him and the heirs of his body, or to him for life or years; and these directions being constantly complied with, grew by length of time into established rights, and they came to be called *tenants at will*, according to the custom of the manor.

THEY were still called tenants at will, because, they had been originally such, for they were never considered as, nor called, *freeholders*, until very lately, in one instance, they were admitted to vote for members of parliament, and their votes allowed by the house of commons. This decision was greatly exclaimed against by the tories, who were foiled by this reception, as proceeding from a spirit of party, and as being contrary to the rules of the antient law, as it certainly was. But, on the other hand, it was agreeable to common reason and justice, and to the spirit and principles also, though not to the practice of the antient constitution. For when Edward the First lays down this maxim, *quæ ad omnes pertinent ab omnibus debent tractari*, what reason can be assigned why a copyholder for life, who has a valuable, and as certain estate, in fact, as a freeholder, though called by a different name, and who contributes equally to the taxes and expences of the government, should not have equal privileges, and be equally intitled to be represented. They are called *copyholders*, from the evidence they had of their titles. The evidence that freemen had of their estates in land was either a *deed*, if the grant was by deed, or if it was without deed, the *livery and seizen*, attested by the witnesses present; but the copyholder had no deed, neither was livery and seizen given to him, as he was originally but a tenant at will. His evidence, therefore, was a copy of the rule entered in the lord's court roll, which was his title, and from hence was he named copyholder †.

THE peculiarities attending this kind of tenure, that distinguished it from other tenures, arose from their being considered as tenants at will. Hence arose that antient opinion, that if a lord ousted his copyholder, he could have no remedy by action in the king's court against him: But had this been the law that since prevailed, all copyholders had been long since destroyed. Therefore, in Edward the Fourth's reign, it came to be settled, that

† Fitzherbert's *natura brevium*, p. 28. Kitchen on Courts.

that if the lord turned out his copyholder, he might well maintain an action of ejectment against him, as a tenant for years could, or else they might sue the lord in equity to be restored.

FROM the same principle of its having been an estate at will, arose the right of the lord to a fine, upon the change either of lord or tenant; upon the change of the lord by the act of God only, that is by his death; upon the change of the tenant, either by the act of God, by his death; or by his own act, by his alienation. But the tenant paid no fine on the lord's alienation; for if he was so to do, he might be ruined by being frequently charged. These fines were an acknowledgment of the lord's ancient right of removing them, and were, in some places, by custom, fixed at a certain rate; in others, they were uncertain, and settled by the lord: However, he was not allowed to exact an unreasonable one, for if so, the tenancy would have been absolutely in his power, and of the reasonableness of the fine the judges of the king's courts were to determine.

I MENTIONED the alienation of copyholders, but to alien directly they could not, being esteemed but tenants at will, yet what they cannot directly do, they may indirectly, by observing certain forms; that is, by surrendering to the lord, to the use of such a person, and then the lord is, in equity, compellable to admit into the copyhold the person for whose use it is surrendered. These surrenders are either made in the manor court, or out of it. If made in court, it is immediately entered in the court roll; if out of court, it should be presented at the next court day, and then entered. The surrender out of court must be made to the lord himself, or to the steward of the manor, or it is not good; except in some particular manors by custom, where it may be surrendered to the lord's bailiff, or to two or more of the copyholders, who are to present it at court. When a surrender was made, the lord was only an instrument to hand it over, and therefore must admit that grantee into such estate, and no other, whom the grantor had appointed in his surrender. In many cases a court of equity will supply the want of a surrender.

COPYHOLDERS could not devise their lands by will for two reasons. First, that, in general, lands were not devisable till the reign of Henry the Eighth; and

and for another reason peculiar to themselves, that, being called tenants at will, they were not looked upon to have a sure and permanent estate. But when, after the invention of *uses*, a way was found out to evade the general law, and to make lands go by will, by the owner granting his estate to another for the use of himself, the grantor, for life, and after, for the use of such persons as he, the grantor, should name in his will; and when courts of equity were found disposed to oblige the grantee to perform the trust he had undertaken, in imitation hereof, copyhold estates began to be surrendered to the lord to the use of the copyholder's last will; and then the lord, after his death, was obliged to admit such person as he appointed in such his will, and in the mean time, the copyholder enjoyed during his life, for the surrender only did not transfer the estate, except it was to the lord's own use. If to any other use, the lord was but an instrument, and the land remained in the surrenderer until the admittance of the new tenant, which, in the case I have put, could not be till the old one was dead.

ANOTHER peculiarity arising from the same source, there being tenancies at will, was, that neither the husband could be tenant by the courtesy, nor the wife tenant in dower. The reason was, that every estate at will determined by the death of the tenant, neither could an estate tail be created of a copyhold; for the statutes *De Donis* extended not to them, and, therefore, if a gift was made in such words as would, at this day, create such an estate, it would be in the nature of a *fee simple conditional* at common law. However, by special custom in particular manors, copyhold might be entailed; might go to the tenant by the courtesy, and the wife might be endowed thereout †.

THUS much I have thought requisite to shew the general nature of this tenure, and of its origin. More would be needless to say here, as there are no such in this kingdom, though the law relating to them makes a considerable part of the law of England. For the same reason I shall be very short as to the tenants in antient demesne.

LANDS in *antient demesne* are the estates that the king had, as king, to support his family, and other expences, and were antiently unalienable. They were the lands of Edward the Confessor, and the Conqueror. But as the king could not make profit of them himself, they were given to te-

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† Coke on Littleton, lib. 1. chap. 8.

nants of two kinds, freeholders and copyholders. The law with respect to them stands as it does with other freeholders and copyholders, except that they have some peculiar privileges. The general reason of these privileges was, that the freeholders were originally socage, and the copyholders the villenage tenants of the king, and had these privileges granted to them because they were supposed constantly employed on the king's land, to furnish him with corn, cattle, and other necessaries; and their privileges have continued, though the services have been changed into money, and the estates almost all alienated from the crown. These are principally as follow: They are exempted from all burthens and taxes laid on by parliament, unless they are specially named. They are not to be taxed for the wages of the knights of the shire. They are not to pay toll, or passage money for goods bought and sold in markets, for all things concerning husbandry and sustenance. They are not to be impleaded in any court, only in their manor court, nor to be summoned as jurymen, with some other privileges of the like nature, not necessary to be here insisted on †.

† Madox, Hist. of the Excheq. vol. 1. p. 295. Cowell's Interpreter, voc. Demaine. Spel. Gloss. voc. Dominicum.

LECTURE XXVI.

The condition and state of laws in England during the Saxon times—The military policy of the Saxons not so perfect as that of the Franks—Their Kings elective—The division of the kingdom into shires, hundreds, and tithings—The administration of justice—The county-court—The hundred court and court-leet—The court-baron—The curia regis—Method of trial in the Saxon courts—The ordeal—The waging of law—The trial by battle—Furies.

HAVING drawn a rough delineation of a feudal monarchy, and given a general account of the ranks of people of which it was composed, and of their distinct rights and privileges, it will next be proper, agreeably to what I first proposed, to observe, through the several reigns, the progress of English law, and by what steps and gradations it is come to differ so widely from what it was in its original; not, indeed, to go minutely through all the alterations made, for that would be a task that could not be confined within the compass of these lectures, but to point out the great and considerable changes, which had extensive influences, and contributed to give the law a new face. But, before I enter upon this, it will not be amiss to look back a little, and to say something with respect to the law in the Saxon times, since much of that remained after the conquest, and even makes a part of our law at this day.

THE Saxons, being a German nation, brought into England the customs of that country, customs very similar to, and, in many instances, exactly the same with those used abroad on the continent. However, with respect to their military policy, it was not so strict and perfect as that of the Franks, occasioned, as I suppose, by their greater security from danger. For they had no reason to dread the Britons, having extirpated many, and expelled the rest, except a few whom they kept in the meanest offices, in the nature of villeins. Neither was the authority of their kings so great as abroad, for

the founders of the kingdoms of the heptarchy were not kings in Germany, as the kings of the Franks and other nations had been, but only leaders of adventurers, who voluntarily associated themselves, and therefore could have no authority but what their followers confirmed upon them; and that it was not very considerable, appears from this, that every thing of great moment was transacted in their general assemblies or *wittenagemots* †.

THESE kings were elective, though generally those of the same family, (for to this also there were some exceptions) were elected. Offa says of himself to his people, *Electus ad libertatis vestræ tuitionem, non meis meritis, sed sola liberalitate vestra*. From the death of a former king to the election of a new one there was an *interregnum*, and even during these interregnums they made laws. For when the excellent king *Brithric* had been poisoned by his queen, they enacted a law, that if any future king should give his wife the title of queen, he should forfeit his dignity, and his subjects should be free from their oath of allegiance; and then they proceeded to elect *Egbert*, *Brithric's* tenth cousin. And, in pursuance of this law, *Ethelbald*, deposed his father, for giving that title to *Judith* of France. *Alfred*, indeed, was not chosen upon a vacancy, but claiming a part of the kingdom before the assembly at *Swinburn*, by virtue of an agreement with his brother *Ethelred*, that assembly annulled the agreement, as destructive to the nation, then threatened by the Danes, but enacted that *Alfred* should succeed to the whole, though *Ethelred*, and also their elder brother *Ethelbert* left sons‡.

I KNOW it is generally said that these three brothers succeeded by their father's will, and so the Conqueror pretended a will of *Edward the Confessor* in his favour, but what had *Ethelwulf* to leave, but the little kingdom of *Kent*, which was assigned to him upon his deposition. Besides his will was, that they should succeed in case of issue failing, and they succeeded though there were sons; and *Alfred*, who should know his own title best, acknowledged he had received his crown from the bounty of the princes, elders, and people. Here I should mention, that the kings had not a right to marry themselves without the consent of their people, for of *Alfred* it is observed,

† Bacon's discourse on the Laws and Government of England, part 1. chap. 16.

‡ Tyrrrel's general Introduction to his Hist. of England. Hume, append. 1.

observed, that he did so, *contra morem & statuta*, not only against custom, but against positive laws. To go through no more particulars; it appears from history, that all the kings of the Saxon race were elected; so were the Danes; so was the last Harold, though not of royal blood, and though Edgar Atheling, who was the lawful heir, had the kingdom been hereditary, was living; so was the Conqueror, and that was the just title he had. But enough of this point.

To see how justice was administered among the Saxons; the kingdom, for this purpose was divided into *shires*, those into *hundreds*, or, as we call them in this kingdom (Ireland,) *baronies*, and these into *tithings*, so called because they originally consisted of ten contiguous families, over which a *tithingman* presided. Every man, in these tithings, was bound to keep the peace, not only for himself, but for the others of his tithing; and if one of them committed a crime, the rest were obliged to search him out, and produce him for trial; otherwise the tithing was grievously amerced. This division of the kingdom into *counties*, and their subdivisions, is generally ascribed to king Alfred. That the division of hundreds into tithings was his is undoubted; and it is probable the division of counties into hundreds was his also; that the people, beggared by the Danish incursions, might have justice rendered to them nearer their own homes, without the expence, the fatigue, and even danger of travelling to the county town. But as to counties, they certainly were more antient. Justice could not be administered, according to the principles of the German policy, in a country so large as one of the kingdoms of the heptarchy, without its being subdivided; and accordingly, during those times, before the union of these kingdoms into one, we find, in the old laws, the mention of *shires* and *sheriffs* †.

BUT though Alfred was not the first maker of the divisions, we are not therefore to charge the writers that give that account with falsity. Even before his reign the Danes had made settlements in England, in the northern parts. In the very beginning of it they reduced him to content himself with the countries south of the Bristol channel and Thames, with the addition of

Essex,

† Spelm. Gloss. voc. Comitatus, hundredus, et trithinga. Tyrrel's introduction to his Hist. Carte's Hist. vol. i. p. 310. Spelm. life of Alfred. Gurdon's Hist. of Court Baron and Court Leet.

Essex, which, in their ravages, they had thrown into the greatest confusion. The rest of England was left as their prey, in which, after ravaging it several years, they fixed themselves, until, at length this great prince, to whom no king, I may say, no man, whom history has recorded; was superior, either for piety to God, for a strict love of justice, for a fatherly affection to his people, for heroism in battle, for fortitude of mind (that never despaired in the lowest state of his affairs, when all seemed desperate) or for a wisdom capable of directing upon every occasion the proper measures to be taken by the state over which he presided; I say, until this great prince trampled his enemies under his feet, and obliged the Danes, who had so long looked upon him with contempt to sue to become his subjects, and to receive the lands they had usurped, from him as their king and lord. For to expel them was impossible, and if it had been otherwise, and the matter had been effected, they had committed such massacres in the lands they possessed, that the country would have been desolate. Then, indeed, this king settled the limits of shires or counties, through all England; in Essex, and the counties south of the Thames, I presume, according to the old limits. For if we allow for one county being more woody, or having more unprofitable land than another, they appear to bear no great disproportion to each other. But, as to the lands the Danes held, it was different, for here, to win his new subjects, he was to accommodate the division somewhat to that which they had made among themselves, under their several leaders. Hence, in that part of England which was then Danish, we find the greatest difference between the size and value of the lands in the several counties, some excessively large, and others as exceedingly small; which, I think, is no way to be accounted for, in so wise a prince, but that the several tribes of these Danes were to be kept in their old bounds, and separate from each other. In such a succession of ages, undoubtedly, these boundaries have received alterations, but they could not have received such as would account for the disproportion; and in truth we find the Danes had divided the land before he conquered them.

IN those counties and hundreds justice was administered to the inhabitants near their homes, without the delays and expences of resorting to Westminster. The court held by the sheriff, assisted by the bishop, was, in its origin, as we find in the red book of the exchequer, and had cognizance of four

four several matters that were handled, in this order. First, all offences against religion and the ecclesiastical jurisdiction were tried. The bishop, or his commissary, here was judge, and the sheriff was his assistant; and if the delinquent disregarded the censures of the church, he enforced the sentence by imprisonment. Next were tried temporal offences, that concerned the publick, as felonies, breach of the peace, nuisances, and many others. Here the sheriff was judge, and the bishop was assistant, to enforce the sentence with ecclesiastical censures. Thirdly, were tried civil actions, as titles to lands, and suit upon debt or contracts. Here the sheriff presided, but the *suitors of the court*, as they were called, that is, the freeholders, were the judges, or as we now say, the *jury*, and the sheriff executed the judgment; assisted by the bishop, if need were. Lastly there was held an *inquest*, to see that every person above twelve years of age who was in some tything, had taken the oath of allegiance, and found security to the king for his good demeanor. This was called the *view of frank pledge*, that is, the viewing that every person had nine freemen pledges or security for his loyalty to the king, and his peaceable behaviour to his fellow subjects †.

BUT since the time of king Edgar, at least, this court has been divided into two, the criminal matters, both ecclesiastical and civil, and also the view of frank pledge was dispatched in one court called the *tourn*, that is, the *circuit*, from the bishop and sheriffs going circuit through the county; and the civil business was dispatched in another, called, the *county court*. The law was, that the sheriff and bishop should twice in the year go their circuit or tourn, namely, in the month following Easter, and the month following Michaelmas; and should hold their court in every hundred of the county; but the view of frank pledge was to be taken only once a year, namely the tourn after Easter. But for the more ready dispatching civil causes, the county court was held once a month, that is in twenty-eight days, reckoning a month by four weeks and not by the calendar ‡.

OUT of these courts were others afterwards derived, for the more easy and expeditious way of distributing justice. Out of the sheriff's tourn, were two, the *hundred court*, and the *court leet*, and they had cognizance of the same

† Gurdon's hist. of Court Baron and Court Leet. Cowel's Interpreter, voc. Frank-pledge. Bacon's Discourse on the Laws and Government of England, part. 1. chap. 23.

‡ Bacon, chap. 24.

same matters the tourn had, and were erected independent of the sheriff's tourn, for the mutual ease of him and the inhabitants, where, in large counties, the hundred lay too remote to be conveniently visited in the circuit. But many inconveniencies arising from the sheriff's power not running in these separated jurisdictions, the hundred court, which was held by the steward of the hundred, were all, except a very few, that had been given in fee to some great men, reunited to the tourn, and so they vanished in Edward the Third's reign†.

THE leet was of the same nature as the hundred court, derived out of the tourn, and made a separate jurisdiction; but it was held in the name of a subject, by the lord of the manor's steward, and to the lord belonged the profits of the courts leet. They were, however, though held by a subject, in his own name, esteemed as the king's courts, and allowed to be courts of record, as well as the tourn from which they sprung.

OUT of the county court, which was for private causes, was derived the *court baron*. It was held from three weeks to three weeks, as all courts were in the early Saxon times. It was when a manor was exempted from the sheriff's county court, and the jurisdiction granted to the lord, to hold plea of civil suits. In this the suitors were the judges, as in the county court‡.

IN these several courts was justice administered in the Saxon times, and even for a considerable time after the conquest; for the most part. But soon after that time inconveniencies were found, partly from the partiality of the judges in these inferior courts, and partly, from their ignorance in law. Then began the higher court to draw to themselves the jurisdiction of these matters, and the county courts to be confined to pleas of such matters as exceeded forty shillings in value. The pleas of lands were likewise brought in there, and discussed either in the higher courts, or before justices of *nisi prius*. The appointment of *justices errant*, and *justices of assize*; of *justices of goal delivery*, and of the *quarter sessions*, together with the many powers granted by divers acts of parliament to one or more justices of the peace, have,

† Bacon's discourse on the Laws and Government of England, chap. 25, 26.

‡ Dugdale's Origines Juridicales, chap. 9, 10, 11, 12, 13, 14, 15.

have, in a succession of ages, continually sunk the business of these courts, and have left them but a shadow of what they were.

BUT although most of the business in the old times was in these inferior courts, there was one superior, that even in the Saxon times, had a concurrent jurisdiction with them, the *curia regis*. The *curia regis* sat in the king's palace, and removed with him from one part of the kingdom to another, generally in the king's hall; except when they judged questions belonging to the king's treasure, when they sat in his treasury, called the *exchequer*, from the chequered cloth wherewith the table was covered. The judges were, the justiciary, the chancellor, and the treasurer, together with such great lords as were attendant on the court; so that, in parliament time, all the great lords sat there; and this was the foundation of the lords judicature in parliament. The justiciary presided in all cases that did not concern the revenues, and indeed his power was so exorbitant by the antient law, being regent of the kingdom in the king's absence, that sometime after the conquest, the kings thought proper to abolish the office, and divide even his judicial power into several hands †.

THE chancellor was one of the most learned ecclesiastics. It fell, therefore, naturally to his province to make out all writs, and processes, and letters patent, and consequently the great seal of the kingdom was lodged with him. He attended, likewise, something in the nature of an equity judge; not that there was any such thing as a distinct *court of equity*, but, as a learned and pious man, to direct with his advice whenever the case happened, where conscience dictated one way and the strict law another. The treasurer was present also to take care that the king had his fines from offenders, which he was afterwards to collect into the *exchequer* where he presided, where also he set leases of the king's lands for years, collected his rents and debts, and took care of his escheats and forfeitures. The proper jurisdiction of this court was where the king was concerned in interest as to his revenue; where one of the great peers was to be tried for heinous offences, or even where two persons had been guilty of crimes that seemed to have a general influence, and tended to general confusion. For unless the crime of a lower person was very heinous indeed, he was tried in the country, in the town.

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† Madox, Hist. of Exchequer, chap. 1.

CIVIL causes likewise between the great lords fell under their inspection, but those between meaner persons they seldom meddled with, unless they had for difficulty been referred or adjourned to them from the courts below, and if they, in that case, found the cause of great difficulty, they adjourned it to the *curia regis* in full parliament. However, as they had the power of judging civil causes between all persons in the first instance, if they thought the cause of such a nature, that justice was not likely to be done in the country, they had many applications from such as had those apprehensions; and as this court had a discretionary power, either of sending them back to the county-court, or of admitting them here, this gave an occasion for exacting fines for license to plead in the king's court, and thereby of increasing his revenue; until at length, when the inferior courts declined in reputation, and every man sought for justice in the *curia regis*, these fines, being arbitrary, became an intolerable grievance, which was remedied by those famous words in Magna Charta, *Nulli vendemus, nulli negabimus justitiam*, as I shall observe hereafter. Such were the courts held in the Saxon times, and for some time after the conquest, whose several jurisdictions it is proper to point out, for the better understanding of the alterations that afterward ensued†.

I NEXT proceed to the *method of trial*, or determining the matters in issue in these courts. And they were the same that were used abroad, which I have already mentioned, and shall therefore barely run them over. First, *ordeal*, either by putting their hands in boiling water, or holding a red hot bar of iron in their hands; or by *cold water*, that is, tying their hands together, and their feet together, and throwing the person accused into a pond; and this method the ignorant vulgar have adopted to try witches. Secondly, the *oath* of the party, with *compurgators*; or, as it is called, *waging his law*; and in this manner was Earl Goodwin acquitted of the murder of Alfred, king Ethelred's brother. Thirdly, *battle*, which was the usual method of trying the title to lands, and appeals of felony, or capital crimes.

If a man was indicted of felony at the king's suit, he could not offer battle; for challenging the king was a breach of alledgiance, but if he was appealed of felony by a subject, he had his choice either of battle, or submitting to be tried by a jury. But if he waged battle, he must fight in proper

† Madox, Hist. Excheq. Dalrymple on Feudal Property, ch. 7. § 1.

proper person, whereas the appellant, who might be an infant, or decrepid with age, or a man of religion, or a woman, was allowed a champion. If lands were demanded from a man, he had, likewise, the option of trial by battle, or by *grand assize*. If by battle, then were both parties allowed champions, if they desired it; but the champion, in such case, must first swear, that he knows the land was the right of the party he fought for, or that his father told him he knew it, and charged him to bear witness thereof. So that this trial was referring it to the providence of God, which of the two contradictory witnesses, the champions, swore true †.

THE other method was by the grand assize. *Assize*, coming from *assides*, to sit together, signifies a jury. It was called *grand*, because of its number. The sheriff returned four knights, who chose twelve knights more, and their verdict determined. But the most usual method of trial among the Saxons was by *juries*, as at this day, that is, by twelve of the *parēs curiæ*. The invention of these is attributed by the English lawyers to Alfred, and greatly do they exult over the laws of other countries in the excellency of this method. But had they been acquainted with the ancient laws of the continent, they would have found the trial by *parēs* common to all the northern nations, though since wore out by the introduction of the civil law; not so common, indeed, any where as in England; where every age it gained ground, and wore out the other †. Alfred's merit, therefore, was rather in fixing the number, and determining the qualities of the jurors, than in the invention; but what these several qualifications were, will come in more properly in another place.

† Dugdale, orig. Jurid. ch. 25. 26. Nicholson, præfat. ad leg. Anglo. Sax. Du Cange, voc. Duellum et Juramentum. Spel. voc. Campus et Judicium Dei. Muratori antiq. Ital. Dissertat. 38.

† Stiernkook de jure vetusto Sueonum et Gothorum, c. 4. Dissert. on the antiquity of the English Constitution, part. 4. § 4.

LECTURE XXVII.

The punishment of public crimes and private wrongs among the Saxons—The ranks of men among the Saxons—The difficulty of ascertaining the nature of the Saxon estates, and the tenures by which they were held—Observations to prove that the Saxon lands were in general allodial.

IN my last I gave an account of the courts wherein the Saxons administered justice, and of the several methods of trial used in them; it will be proper to add a few words concerning their *punishment* of persons found guilty either of public crimes or private wrongs. When I spoke of the customs of the German nations, while they lived in that country, I observed, that all offences were punished by *finés* only, and none by *death*, two only excepted, desertion in war, and the rape of a married woman. The nations descended from them, when they settled within the limits of the Roman empire, continued the same practice for some ages, as did the Saxons also in England.

ALL wrong and crimes, not excepting murder and high treason, were redeemable by fine and imprisonment, until the Heptarchy was declined; and for this purpose their laws assigned the several mulcts that were to be paid for the different offences. Murder was rated higher or lower according to the quality of the person slain. That of their king himself was valued at thirty thousand *thrymsæ*, a piece of their money. But afterwards it was found necessary to inflict capital punishments. Treason, murder, rape, and robbery, were of the number so punished, though the punishment of rape was afterwards *castration*; but after the Conquest it was made capital again. Corrupt administration of justice was another; for it is recorded, to the praise of Alfred, that he hanged forty four unjust judges in one year †. These were the judges in the tourns, ealdermen of the counties, or their deputies the sheriffs. Other offences against the public continued punishable by fine and imprisonment, and satisfaction for private wrongs was obtained either

† *Mirroir des Justices*, chap. 2.

either by restoration of the thing unjustly detained, if it was extant, or a compensation to the value in damages, if it was not †.

As to the order and ranks of people among them, there were, properly speaking, but two, *freemen* and *villeins*. The last, I presume, were the remains of the antient Britons, but among the freemen there were various orders, not distinguished by any hereditary difference of blood, but by the dignities of the offices they held by the gift of the king. Not that we are to imagine there was no regard whatsoever paid to the descendants of great and illustrious men. As their king was eligible out of the royal family only, so were there a number of other families, to whom the enjoyment of these honourable offices were, I may say, confined, not by any positive distinctive law, but by general practice, and by the king's constantly choosing out of them; and who may, with propriety enough be called the *nobility*. Those honorary offices were of different ranks of dignity; such as those of *ealdermen* or *earls*, *copes*, or as they were sometimes called *Thanes*, *Præpositi*, or rulers of hundreds; all of whom were, originally, removeable at the king's pleasure, though, unless they misbehaved, they were generally continued for life.

SOME, indeed, have thought that earldoms were hereditary, even in the Saxon times, because they see that earl Goodwin's son succeeded him, and the same was true in some other families also. But there is a great difference between a son's succeeding to his father by a legal right of inheritance, and his succeeding either by the voluntary favour of the king, or by his extorted favour, when a family has grown so powerful, as to make it a necessary act in the king, in order to preserve public peace. The latter was the case with respect to earl Goodwin's family. Edward the Confessor hated him mortally for the death of his brother Alfred, as he did his whole family for his sake. However, as he owed the crown solely to his interest and intrigues, as he was well acquainted with the power, and knew that he had spirit enough to attempt dethroning him, if once offended, that prince, who was careless of what came after him, so he might reign in peace during life, caressed Goodwin and his family; dissimulated all resentment, and, after one or two weak struggles, let him and his family govern the kingdom at their

† Tacit. de Mor. Germ. c. 21. L. L. Wal. p. 192. 194. L. L. Anglo, Sax. ap. Wilkins p. 18. 20. 41. Hicel. differt. Epist. p. 110. Lindenbrog, p. 1404.

their pleasure; a conduct that raised them still higher in the opinions of the people, and concurring with the incapacity of Edgar Atheling, Edward's nephew, raised Harold to the throne, as the only man in England capable of defending it against two powerful invaders †.

BUT the great difficulty is to know what kind of *estates* the Saxons had in their lands, and by what *tenures* they held them. This question hath divided the lawyers and antiquaries of England; some holding that the tenures were as strictly feudal, as after the conquest, while others as strongly deny it. I shall not, in this difficult point, pretend to decide absolutely where so great masters differ, but only make some observations that perhaps would induce one to believe, that the Saxon lands were, in general, *allodial*, some of them military benefices for life, and none, or, if any, at least very few feudal inheritances; and this I take to be the truth of the matter.

FIRST, then, the Saxon lands in general, were inheritances, descendable to heirs; and were all subject to military service. An *Heriot*, which is contended to be the same as the Norman *relief*, was paid upon the death of the ancestor, and all landholders took the oath of allegiance, or of fealty, as they would have it; and therefore, Coke and others conclude that their lands were feudal, and held by knight service; and tho' there are no traces either of *wardship* or *marriage* to be met with in those times, they insist that they, as fruits of knight service, must have been in use tho' from the paucity of the Saxon records remaining, they cannot be discovered ‡.

THIS reasoning seems to have great strength, and yet, if we examine with a little attention, perhaps, these very arguments, when well considered, will prove the contrary, *viz.* that most of the Saxons lands were allodial.

FIRST, then, as to their being hereditary: This, singly, is far from being a proof of their being held by a feudal tenure. The lands of the Greeks, of the Romans, I may say of all nations, except the conquering Germans, nay, the allodial lands in their conquests, were hereditary. Their being so seems rather a proof of their not being founded on the feudal policy; for the

† Selden's tit. of Hon. part 2. ch. 5. Hume, vol. 1.

‡ 1 Inst. 76. Bacon on the Government of Engl. p. 75. Saltern de antiq. leg. Brit. c. 8.

the military benefices did not become inheritances any great length of time before the conquest; whereas there is no ground to believe that the Saxon lands were ever otherwise. Besides, they had some qualities that are utterly incompatible with the feudal system. They were not only inheritances, but were *alienable* at the pleasure of the owner, without any leave from the superior, and were, likewise, devisable by will; so that the Saxons were absolute masters of their land, and not obliged to transmit to the blood the donor intended to favour, contrary to the feudal law abroad, and to our law after the conquest. I shall observe, by the way, that some lands in England in particular places, being by custom devisable by will after the conquest, was a relic of the old general Saxon law, those places not having, along with the rest of the kingdom, embraced the feudal maxim †.

ANOTHER striking difference is, that the Saxons lands were not forfeitable for felony, which still remains by custom in the *gavelkind* lands in Kent, whence that country proverb, *the father to the bough and the son to the plough*. Their lands likewise were equally divisible among all the sons, as were gavelkind lands; which is a customary relic of the Saxon law, contrary to general rule, since the conquest, where, at first, the king chose one, and afterwards, as at this day, the eldest alone succeeded. But this last I will not urge against their being of feudal origin, for that was the antient law of fiefs; it only shews there was a considerable alteration introduced at the conquest. However, though their being inheritances singly will not prove them fiefs, yet, when that is joined to the military tenure, to the payment of reliefs, and to the oath of fealty, we must allow them to be such. Let us see then, whether any of them, singly, or taken all together, will enable us to draw that conclusion ‡.

CERTAIN it is, then, that all the lands in England were, in the Saxon times, liable to military service; but this will not prove that they were feudal. For, as I have observed in a former lecture, the allodial lands in France were subject to the same. Every man who held land as an allodial tenant, was, according to the quantity, either to find a foot soldier equipped for the wars, or to join with another to find one, if he had not land sufficient.

† Spelman on Feuds and Tenures. ch. 6.

‡ Taylor and Somner on Gavelkind, and Harris in his Hist. of Kent, p. 457.

ent. These allodial lands were subjected by law to three sorts of duties. The first I have mentioned, the other two were building, and repairing bridges, and furnishing waggons and carriages for the conveyance of arms and the king's provisions, or money †.

THE Saxon lands were, likewise, subject to what they called *trinoda necessitas*, the three knotted obligation. The first was, furnishing a foot soldier; the second, which was not in the allodial lands abroad, was *arcis constructio* the building and keeping in repair castles and forts, where the king, for the public good, ordered them to be erected; and lastly, *pontis constructio* the building and repairing of bridges. As to furnishing carriages, the Saxon freemen were exempted; these being supplied, in that constitution, by the lower tenants in ancient demesne; or the king had a right to seize any man's carriages by his purveyors, and use them upon paying for them. This right of purveyance of carriages, and of timber, and of provisions for the king's household, which was intended for the king's benefit, and by which no loss was to accrue to the subject, as he was to be paid the value, became, in the hands of the greedy purveyors, an occasion of great grievances; those officers seizing, often more than was wanted, often where nothing was wanted, merely to force the proprietor to a composition of money on restoring them. The manner of payment, too, became very oppressive. The rates were fixed at first at the due value, but as the rate of money changed, and the prices of things rose, it came to be under the half, and as it was not paid for on the spot, but by tickets on the treasurer, the owners, were frequently put to more trouble and expence in attendance than the value of their demand. This the purveyors well knew, and therefore turned their office into an engine of extortion. Many were the proclamations issued by the king; many the acts of parliament made to regulate it; But the evil was inveterate, and proved very heavy even under the best princes. The complaints of these oppressions were as great under Elizabeth as under her successor James, and indeed, the evil was so inveterate, that nothing but cutting it up by the roots, the destroying purveyance itself, could cure it ‡.

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† Spel. gloss. voc. Burghbote et Brughbote.

‡ Tyrrel's Introd. p. 120. Spel. Reliq. p. 22.

BUT to return to the military duty done by the Saxons in general for their lands. In the first place, then, they served as foot soldiers, and not on horseback, and in compleat armour, as the feudal tenants were obliged. Again, the feudal tenants attended not but when called upon, whereas, the Saxons had regular times of meeting and mustering, though not summoned, in order to see that the men were well trained, and properly armed. But the great difference lay in this, that no particular person was bound to military duty, in consideration of his tenure in the lands. The lands themselves were liable. Every hide of land found a man, whether it was in the hands of one, or more persons. There was then no personal attendance, and, consequently, no commutation for it. The hide of land supported its soldier, while he continued fighting in his own county; but if in another, he was to be maintained either by that county, or the king; whereas, the military tenants, by the feudal law, were obliged to serve forty days at their own expence, wherever the king pleased, if the war was a just, or a defensive one; and indeed, as William the Conqueror modelled it, if the war was even unjust, or offensive. These differences, added to what I have already observed, concerning their lands not being escheatable for felony, being alienable, and being devisable by will, I think, shew plainly that, though the lands were subject to military service, it was upon grounds and principles very different from the feudal ones, and that they were rather in the nature of the allodial lands on the continent.

As to *Herriots*, which Coke and his followers insist much upon, as being *reliefs*, they also, when thoroughly considered, will, perhaps, be found to be of a different nature. A Herriot was a title the landlord had from his tenants, and the king, as supreme landlord, from his, of seizing, the best beast of his dead tenant, or his armour, if he was a military man. These being due upon the death of the tenant, certainly bore some resemblance to the reliefs on the continent, and are in king Canute's law, which was written in Latin, called by the name of *relevatio*. To shew what they were in that time, the *relevatio*, or Herriot of an earl, was eight horses, four saddled, four unsaddled, four helmets, four coats of mail, eight lances, eight shields, four swords, and two hundred marks of gold; of the king's thane four horses, two saddled, two unsaddled, two swords, four lances, four shields, his helmet and coat of mail, and fifty marks of gold; of the mid-

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ding thane, a horſe with his furniture, with his arms. But, then, Spelman juſtly obſerves, that theſe were not paid by the heir, as a relief to the lords, to entitle him to enter on the inheritance. The heir had the lands immediately and was not obliged to defer his entry till he had paid them, as he was his relief by the feudal law, and by the law of England after the conqueſt. Nay, they were not paid by the heir at law, but by the executor or adminiſtrator, as a perquiſite out of the tenant's perſonal fortune †.

HOWEVER, William the Conqueror, finding theſe perquiſites in uſe, and that in Latin they were called *relevationes*, took advantage thereof, and as the forfeited lands he beſtowed on his Normans were given upon the terms, and with the ſame burthens as lands on the continent, ſo were the reliefs he exacted from ſuch in the ſame manner, made payable by the heir, not the executor; and as to the unforfeited lands, which remained to the Saxons, and were very inconfiderable in number, he, in the manner I ſhall ſhew in the next lecture, converted them, into real fiefs, ſuch as were then in uſe in France; from whence the reliefs came, likewise, to be exacted from the heir, and to be conſidered as redemptions of the inheritance, which, upon the principles of the feudal policy, could not be entered upon by the heir till the relief was paid. This alteration it was not in the Saxon landholders power to oppoſe, on the account before-mentioned; nor, indeed, was the burthen on the heir ſuch, if no conſequences were to be apprehended from it, as deſerved oppoſition; for William fixed the reliefs at a certainty, at the ſame rate, or with very little addition, as the Herriots were in Canute's law.

BUT experience ſoon ſhewed what effects might follow from the conſtruction of Norman judges, at the devotion of a king, upon the word *relevium* being uſed, and its becoming payable by the heir, inſtead of the executor; his ſon and ſucceſſor inſiſted that reliefs were by the feudal law arbitrary, and looked upon his father's limiting them as a void act, that could not bind his ſucceſſors. He, accordingly, exacted arbitrary and exceſſive reliefs both from the Norman and Saxon landholders in England, which exaſperated both equally againſt him; for though the reliefs in France were, by no law, as yet reduced to a certainty, yet by cuſtom they were to be reaſonable,

and

† Dr. Brady's Gloſſary to his Tracts, p. 3. Spelman on Feuds and Tenures, p. 17. and 18.

and not to be merely at the will and discretion of the king or lord; in consequence of which he was, on some occasions, forced to depend almost entirely, in his wars with Normandy, on the mercenary army of the lower English, who had no property; and had his reign continued much longer, it is extremely probable he would have felt severely for the oppressions he laid his military tenants of both nations under. But he dying in ten years, Henry was obliged, before he was elected, to swear to observe the laws of Edward the Confessor, which he did, with such emendations as his father the Conqueror had made; and accordingly, as to *reliefs* he faithfully observed his oath; but it being inconvenient for the heir, who was at a call to perform military duty, to be obliged to pay his relief in arms, which he might want on a sudden emergency, it was therefore, generally commuted for money. However, there being no settled rate fixed, at which this commutation should be regulated, this also was made an engine of oppression in John's reign, until it was finally fixed at a certain sum of money, according to the different ranks of the persons, by *Magna Charta* †.

As to the last argument, of the *Oath of fealty* being taken by the Saxons, it is the weakest of all. An oath of fealty taken by a feudal tenant, was to his *lord*, whether king or not. It was merely as tenant to him of land, and in consideration of such, and consequently the proprietors of land only were to take it. The oath the Saxons took, which is likened to this, was to the king, as king not as landlord, and not at all in consideration of land; for every male person above the age of twelve years was obliged to take this oath among the Saxons, whether he had lands or not. In truth, it was no more than an oath of allegiance to the king, as king, which was common in all kingdoms, and not peculiar to those where the feudal maxims prevailed ‡.

HENCE I think I have some liberty to conclude, though I do it with due deference, as the greatest masters in the antient laws and records of England have been divided in this point, that the very reasons urged to prove that lands were held in the Saxon times as feudal inheritances, prove rather the

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† Madox, *Hist. of the Exchequer*, vol. 1. chap. 10. § 4.

‡ Spelm. on Feuds and Tenures, chap. 21.

contrary, and that they were, in the general I mean, of the nature of the allodial lands on the continent.

IN my next I shall speak of the alterations introduced by the conqueror, both as to the tenure of lands in England, and as to the administration of justice, which were so remarkable, as to deserve to be considered with the strictest attention, as they laid the foundation for the great alterations that have followed since.

LECTURE

LECTURE XXVIII.

The Saxons, though their lands in general were allodial, were not strangers to military benefices for life—The alterations introduced by William the Norman, as to the tenure of lands in England.

THOUGH, in my last, I have delivered my opinion, that the lands of the Saxons were not feudal, but allodial, I would not be understood as if there were no lands held by them upon military service, different from the allodial I have already described. It is undeniable, that there was among them *lord* and *vassal*; that there were lands held by such military service as was performed abroad; where the bond of fealty subsisted between lord and tenant, and where the tenants were obliged to serve in person on horseback. But these were few; for the strength of the Saxon army lay in their infantry. Besides, such were not feudal inheritances, but benefices for life, for, in all the records remaining of them, there is not a word implying an estate that could descend, or a single trace of *wardship*, *marriage*, or *relief*, the necessary concomitants of such estates. What puts that out of all doubt, in my apprehension, is one of the laws of William himself, where he says it was he that granted lands *in feudum, jure hæreditario*, which words are added, by way of distinguishing the estates he granted from the military estates for life, in use before. The word *feudum* alone would have been sufficient, had that law been in use before, and the words *jure hæreditario* were added by way of explanation of *feudum*; and *feudum* is added by way of distinction from allodial inheritances †.

WHEN these military benefices began among the Saxons, I cannot say is determined, but shall offer a conjecture, that carries a great face of probability. That they were not coeval with the Heptarchy is certain; for none of the German nations had, at that time, fixed estates for life in their military holdings. What time, then, so probable as the days of Egbert, who.

† Wright on tenures, chap. 2.

who had resided long in the court of Charlemagne, where these tenures were in use, and where he saw the benefit of them? Besides, this was the very time that a body of horse began to be wanted, who could move swiftly to encounter the Danes, then beginning their ravages, and whose practice it was to land in separate bodies, and to kill and plunder, until a superior force assembled, and then reimbarking, to commit the same devastations on some other defenceless part of the coast. But these kind of tenures, as I observed before, could be but few, as most of the lands were inheritances appropriated to particular families.

To come now to William. A single battle, wherein Harold and the flower of the nobility were slain, determined the fate of England. However, many of the great men survived, and the bulk of the nation were averse to his pretensions. A weak attempt was made to set up Edgar Atheling, the only prince remaining of the royal race, but the intrigues of the clergy, who were almost universally on the invader's side (on account of his being under the protection of the pope, and having received from him a consecrated banner) co-operating with the approach of his victorious army, soon put an end to Edgar's shadow of royalty. He submitted, as did his associates, and they were all received, not only with kindness but with many high marks of distinction. William, accordingly, was crowned with the unanimous consent of the nation, upon swearing to the laws of Edward the Confessor; and it must be owned he behaved, during his first stay, with the utmost equal justice and impartiality between the Normans and natives. But the continuing to act in that manner did not consist with his views, which were principally two; the first to gratify his hungry adventurers with lands, the next to subvert the English law, and introduce the feudal and Norman policy in lieu of it †.

THE first step he made there was no finding fault with. It was now allowed, that William's title was legal from the beginning, and that Harold was an usurper, and all that adhered to him rebels. He made enquiry for all the great men that fell in battle on Harold's side. Their lands he confiscated, and distributed, upon the terms of the Norman law, to his followers; but these were not half sufficient to satisfy the expectants, and the English

† Hale's hist. Com. Law, chap. 5, and 7.

English were still too powerful, as he had pardoned all those who survived. He therefore returned to Normandy, carrying Edgar and the chief of the English nobility with him, under pretence of doing them honour, but in reality, that they might be absent while his views were carrying on; and in the mean time he left his scheme to be executed by his Normans, and those he had appointed his regents. I say *his* scheme, for his interest, to exalt one side and depress the other, on which he could not depend, almost forced him to this conduct. The oppressions, therefore, were so exorbitant in his absence, as must necessarily have driven a people to rebel, and for which a man of justice would think the real delinquents ought to be the persons punished, whilst the unhappy nation merited the freest pardon, for whatever they did when actuated by a despair, proceeding from the denial of justice. But that he himself was the immediate source of these distresses is evident from his temper, which was such, that no regents of his durst have acted as they did without his approbation. The Normans began by encroaching on their neighbours the English, nay with forcibly turning them out of their entire possessions. If these applied to the regents in the *curia regis*, there was no redress. If they retaliated the injuries they suffered, they were declared outlaws and rebels †.

THESE proceedings threw the whole nation into a flame, and, had they had a leader of sufficient weight and abilities to head them, William, perhaps, might have been dethroned; but the right heir, and all the men he feared, were out of the kingdom. They produced, therefore, only ill-concerted, unconnected insurrections, headed by men of no considerable figure, provoked by private wrongs; and these being easily suppressed, afforded a fund of new confiscations, which he disposed of in the same manner as the former, and thereby spread the use of the feudal law further into several parts of England: However, though he did not spare the insurgents, nor punish his officers that had occasioned those commotions, he did not, as some have asserted, seize all the lands of England as his by right of conquest; for, when he came over, his court was open to the complaints of the English, and if any of them could undeniably prove, as indeed few of them could, that they had never assisted Harold, or been concerned in the late disturbances, they were restored to their lands as they held them before;

†. Bacon's hist. and polit. discourse, chap. 44, 45. &c. Tyrrel's hist.

fore ; as appears from the case of Edwin Sharrburn, and many others. By these means William obtained the first of his great ends, the transferring almost all the lands of England to his followers, and making them inheritances, descendible according to the Norman law.

BUT as to the inheritances that still remained in English hands, had he not proceeded somewhat farther, they would have gone in the old course, and been free from the burthen of feudal tenure. But how to alter this, and to subject the few allodial lands, as also the church lands, to the Norman services, was the question; for he had sworn to observe Edward's laws. The alteration, therefore, must be made by the *commune concilium*, or parliament, and this he was not in the least danger of not carrying, in a house composed of his own countrymen, enriched by his bounty, and who were born and bred under the law he had a mind to introduce; and who could not be well pleased to see some of the conquered nation enjoy estates on better terms than themselves the conquerors. The pretence of calling this assembly, which was convened in the fourth year of his reign, was very plausible. The English had grievously and justly complained of the constant violation of the Saxon laws, and the only extenuation that could be made for this, and which had some foundation in truth, was, that the king and his officers were strangers, and not acquainted with that law. He therefore summoned this *commune concilium*, or parliament, to ascertain what the ancient law was, and to make such amendments thereto, as the late change and circumstances of affairs required. And, for their instruction in the old law, which was but partly in writing, most of it customary, he summoned twelve men, the most knowing in the laws of England, out of each county, to assist and inform them what those laws were.

ACCORDINGLY, we find the laws of William the First are, in general, little other than transcripts of the Saxon laws or customs. However, there are two, which were intended to alter the military policy of the kingdom, to abolish the *trinoda necessitas*, and in its lieu, to make the lands of the English, and of the church liable to knights service, as the Normans lands were by his new grants, and thereby make the system uniform. His fifty second law is entirely in feudal terms, and was certainly drawn up by some person skilled

skilled in that law, for the purpose I have mentioned. It runs thus: *Statuimus ut omnes liberi homines fœdere & sacramento affirmant, quod intra et extra universum regnum anglie, Willielmo Domino suo fideles esse volunt, terras & honores illius ubique servare cum eo, & contra inimicos & alienigenas defendere* †.

I SHALL make a few remarks on the wording of this law; and first on the word *statuimus*. Wright ‡ observes, that it being plural, implies that this was not by the king alone, but by the *commune concilium*, or parliament, for the stile of the king of England, when speaking of himself was for ages after in the singular number, and in the subsequent part he is plainly distinguished from the enactors of the law; for it is not *mibi*, or *nobis fideles esse*, but *Willielmo Domino suo* in the third person, nor, *terras & honores meos* or *nostros servare*, but *terras & honores illius*; and indeed, in the subsequent law I shall mention it is expressly said in effect, that the subjecting the free lands to knight service was *per commune concilium*. Secondly, the words *liberi homines* is a term of the feudal law, properly applicable to allodial tenants, who held their lands free from the military service that vassals were obliged to: And in this sense was it used in France also, from whence William came. In these words were included also, the men of the church, for as their lands were before subject to the *trinoda necessitas*, it was reasonable when that was abolished, they should be subject to this that came in the lieu of it. *Fœdere* and *sacramento affirmant*. *Fœdus* is the homage, which, though done by the tenant only to the lord, was looked upon by the feudists as a contract, and equally bound both parties, as is *sacramentum*; as appears after the feudal oath of fealty; and they are placed in the order they are to be done, homage first and then the oath of fealty. *Willielmo Domino suo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant to a landlord, for the lands he holds. *Fidelis* is the very technical word of the feudal law for a vassal. But the words *intra & extra universum regnum anglie* are particularly to be observed: For these made a deviation from the general principles of the feudal law, and one highly advantageous to the kingly power. By the feudal law no vassal was obliged to serve his lord in war, unless it was a defensive war, or one he

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† L L. Anglo Saxon, ap. Wilkins, p. 228. Wright on tenures, p. 66.

‡ P. 69.

thought a just one, nor for any foreign territories belonging to his lord, that was not a part of the feignory of which he held ; but this would not effectually serve for the defence of William. He was duke of Normandy, which he held from France, and he knew the king of that country was very jealous of the extraordinary accession of power he had gained by his new territorial acquisition, and would take every occasion, just or unjust, of attacking him there ; in short, that he must be almost always in a state of war. Such an obligation on his tenants, of serving every where, was of the highest consequence for him to obtain ; nor was it difficult, as most of them had also estates in Normandy, and were by self-interest engaged in its defence.

THE next law of his I shall mention is the fifty-eighth, which enjoins all who held lands by military service, and some others, to be in perpetual readiness. It runs to this effect : “ We enact and firmly command, that all
 “ earls and barons and knights and servants, *servientes*, (that is the lower
 “ soldiers, not knighted, who had not yet got lands, but were quartered
 “ on the abbeys,) and all the freemen, (namely the Saxon freeholders, and
 “ the tenants of the church, which now was subjected to knights service) of
 “ our whole aforefaid kingdom, shall have and keep themselves well in
 “ arms, and in horses, as is fitting, and their duty ; and that they should be
 “ always ready, and well prepared to fulfil and to act whensoever occasion
 “ shall be, according to what they ought by law to do for us from their
 “ fiefs and tenements ; and as we have enacted to them by the *commune*
 “ *concilium* of our whole kingdom aforefaid ; and have given and granted
 “ to them in fee in hereditary right.” The great effect of this law was to settle two things, not expressly mentioned in the former ; the first to shew the nature of the service now required, knight service on horseback ; and the other, to ascertain to all his tenants, Saxons as well as Normans, the hereditary right they had in their lands, for if that had not been done by this law, as now all lands were made feudal, and their titles to them consequently to be decided by that law, they might otherwise be liable to a construction, according to its principles, that any man, who could not shew in his
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title *words of inheritance*, which the Saxons generally could not, was but tenant for life †.

THIS general law then put all on the same footing, and gave them inheritances, as they had before, but of another nature, the feudal one, and consequently, made them subject to all its regulations. From this time, and in consequence of these laws, the maxim prevailed, that *all lands in England are held from the king*, and that they all proceeded from his free bounty, as is strongly implied in the word *concessimus*; and hence some, indeed many, have imagined that the conqueror seized all the lands of England, as his by right of conquest, and distributed them to whom, and on what terms he pleased. With respect to the greater part, which he gave to his Normans, this is true; but it appears from the records of his time, that it was not universally the case. The laws I have mentioned so changed the nature of the inheritances, which he did not seize, that they were subject to all the same consequences, as if he had so done; though in truth, with respect to the Saxons, he did not dispossess them. It was but a fiction in law.

I HAVE mentioned that he made the lands of the church liable to knights service, in lieu of the military expedition they were subject to before; but this is to be understood with some limitation. For where the lands of an ecclesiastical person, or corporation, were barely sufficient to maintain those that did the duty, they, for necessity's sake, were exempted; and the Saxon expedition being abolished, the contribution thereto fell with it, and they became tenants in *frankalmoine*, or *free alms*. But where an ecclesiastical corporation was rich, and able, besides their necessary support, according to their dignity, they were, by these laws, under the words *liberi homines*, subjected to the new ordained military service, as they had been before to the old, and according to their wealth, were obliged to find one or more knights or horsemen. If they were obliged to furnish as many as a baron regularly was, they were barons, as all the bishops and many of the great abbots were; and, as barons, sat in the *commune concilium*; whereas, before, the clergy in general sat in parliament, as well as the laity, not as a separate body, nor invested with separate rights, but both clergy and laity equally concurred in making laws, whether relative to temporal affairs or spiritual; though, with respect to the latter, it may well be inferred, from

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† L L. Anglo. Saxon. ap. Wilkins. Wright on tenures, p. 72.

the ignorance of the times, that they had almost the entire influence. But after this time the clergy became a separate body from the laity, had distinct interests also, and a separate jurisdiction; nay, I may say, became, in some degree, a separate branch of the legislature, by the right they claimed, and exercised, of making canons to bind laity as well as clergy †. But the explaining this would carry me too far at present, so I shall defer it to my next lecture.

IN the mean time, I shall just recapitulate the prodigious alteration, as to the properties of landed estates in England, introduced by the two laws of the conquerors, I have mentioned, from what was their nature and qualities before that time. They had been the absolute proprieties of the owner, (I speak in general,) they could be aliened at pleasure, they could be devised by will, were subject to no exactions on the death of the owner, but a very moderate settled herriot paid by the executor. In the mean time, on the death of the ancestor, the heir entered without waiting for the approbation of the lord, or paying any thing for it; and his heir, if there was no will, was all the sons jointly. No wardship, or marriage, was due or exacted, if the heir was a minor. All these, by the feudal customs being introduced, were quite altered. Lands could no longer be aliened without the consent of the lord. No will or testament concerning them availed any thing. The heir had no longer a right to enter into his ancestor's inheritance immediately on his death, until he (not the executor) had paid a relief (and that not a moderate one) and been admitted by the lord. The heir, likewise, was not all the sons jointly, but one, first, such as the lord pleased to prefer; at length it became settled universally in favour of the eldest; and the fruits of tenure, wardship, marriage and relief (for the Saxon herriot was, as I have mentioned, a different thing) came in as necessary attendants of a feudal donation.

No wonder, then, that it has been said William introduced a new law, the Norman one. He certainly did so as to landed estates; but this, as I have observed before, by the consent of his parliament, who, being Normans, were as well pleased with the change as himself; but it is not true
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† Madox, *Baronia Angl.* p. 25. Seld. tit. hon. part 2. ch. 5.

with respect to the other old Saxon laws, which did not clash with the design of introducing the military feudal system. Them he confirmed, and his feudal laws were called only emendations. However, certain it is, his secret design was to eradicate even the Saxon, the laws he had, in pursuance of his coronation oath, confirmed, and that he took many steps thereto; which though they had not the full effect he intended, wrought considerable changes. What these were, and the consequences of them, shall be the subject of the next lecture.

LECTURE

LECTURE XXIX.

The alterations introduced by William, as to the administration of justice—The Judges of the Curia Regis are appointed from among the Normans—The county courts decline—The introduction of the Norman language—The distinction between courts of record, and not of record—The separation of the spiritual and temporal courts—The consequences of this measure.

WILLIAM, by altering the nature of land estates, and the conditions upon which they were held, had proceeded a good way in his second capital design, the introduction of the Norman, and the abolishing of the Saxon law. And farther than that, it was not proper nor consistent with his honour, who had sworn to Edward's laws, to proceed openly. However he formed a promising scheme for sapping and undermining the Saxon law by degrees. First, he appointed all the judges of the *curia regis*, from among the Normans, persons fond of their own law, ignorant of the English, and therefore incapable, even if they had a mind, to judge according to it.

BEFORE his time this court only meddled with the causes of the great lords, or others that were of great difficulty, but now it was thought proper to discourage the county courts, and to introduce most causes originally into the superior court; and for this there was a reasonable pretence, from the divisions and factions between the two nations and the partialities that must ever flow from such a situation of affairs. The ancient laws of England had been written, some in the Saxon, some in the Latin tongue, and the laws of William, and of many of his successors, were penned in the latter language. But in the *curia regis* all the pleadings henceforward were entered in the Norman tongue, the common language of his court, as were also, all the proceedings therein, until the time of Edward the Third. This introduced the technical law terms and with those came in the maxims and rules of administering justice belonging to that people, which gradually, wherever they

they differed from, superseded the English. Hence proceeded the great affinity I may say, identity, between the antient law of Normandy, as set forth in the *coutumier* of that country, and the law of England, as it stood soon after the conquest.

THE analogy, however, did not arise from this alone. Though England borrowed most from Normandy, yet, on the other hand, Normandy borrowed much from England. William, for the ease of his people, who had occasion to frequent his court, or had suits in the *curia regis*, established schools for instructing persons in this language, and obliged parents of substance to send their children thither, which had the consequence of abolishing the old Saxon tongue, and forming a new language, from the mixture of both †.

THIS introduction of a new language, together with the exaltation of the *curia regis* and the consequent depression of the county courts, introduced, as I apprehend, the distinction between the *courts of record*, and *not of record*, and made the county courts considered of the latter kind. Courts of record are such whose proceedings are duly entered, which, at that time, was to have been done in the Norman tongue, and which proceedings are of such weight, as, unless reversed, for ever appearing from the record, can never be gainsaid or controverted. Now, to allow such a privilege to the proceedings of the inferior courts, the county ones, where the suitors were judges, and where, besides, the proceedings were in the English language, would have been contrary to the policy of that time, and would have tended rather to the confirmation than depression of the old law. The spiritual courts, also, are not allowed to be courts of record, and that, I presume, because they were antiently a part of the county courts, and separated from them, as I shall shew presently in this reign, and therefore could have no greater privilege than the court from which they were derived. However some inferior courts, such as the *tourn*, and the *leet*, were allowed to be courts of record, and that, I conceive, both for the benefit of the realm, and the profit of the king; for these were criminal courts, where public offences were punished, and therefore should have all weight given them, and where the king's forfeitures and fines for crimes were found.

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† Dugdale's orig. jurid. c. 34. Madox, hist. of Excheq. ch. 2. La coutume de Normandie.

I HAVE observed before, that the courts, in the Saxon times, were mixed assemblies, where the bishop and sheriff presided, and mutually assisted each other, and where the bishop, I may add, had a share in the amerciaments and fines. But in this reign the spiritual and temporal courts were separated by William, a thing which afterwards was of bad consequence to many of his successors, but was, at the time, very serviceable to the views he then had. This was certainly done partly to oblige the pope, who had espoused his title, and at this time was setting up for the universal lord of churchmen, though, in after times, they carried their pretensions much higher †.

ONE great engine the popes set on foot to attain the power they aimed at, was to make a distinction between *clergy* and *laity*, to have the matters relating to the former, as well the merely spiritual as the temporal rights they had acquired, cognizable only in their own jurisdictions; and, to preserve the distinction stronger, to forbid their interfering in the temporal courts, upon pretence of their time being taken up in spiritual exercises, and particularly, that it suited not the piety and charity of a clergyman, even by his presence, to countenance the proceeding to sentence of death, or the mutilation of limbs. Many were the laws they made for this purpose, upon motives of pretended piety; and the circumstances and practices of the times contributed greatly to their success. The emperors, kings, and great lords, had the nomination to bishoprics, and other benefices, as their ancestors had been the founders, and their lands were held from them. But shameful was the abuse they made of this power. Upon pretence of the clergy being their beneficiary tenants, according to the principles of the feudal law, they exacted reliefs, and arbitrary ones from them before investiture, or, to speak in plain terms, they sold them on Simoniacal contracts to the highest bidder, as the Conqueror's son William did afterwards in England; so that the profligate and vicious were advanced to the highest dignities, while the conscientious clergy remained in obscurity; nay, if they could get no clergyman to come up to their price, they made gifts of the title and temporalities to laymen, nay, to children; it was a matter of little concern that there was no one to do the spiritual office.

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† Baron Gilbert's hist. of Excheq. p. 55. Lord Littleton's hist. of Henry II. 4to. vol. I. p. 43. 457. Carte, vol. I. p. 419. 420.

SUCH practices, (and they were too common) gave just and universal offence to all sober persons, so that the popes were generally applauded for their aiming at the reformation of the evils, and for the endeavouring, by their decrees, to reform the morals of the corrupt clergy, and to restore an elective manner of conferring benefices, though their real design was first to become the protectors of the clergy, next, their lords and masters, and then, by their means, to tyrannize over the laity; a plan which they carried into execution with too much success. This plan was in the height of its operation in William's reign. The foundation of it had been laid before, as I observed, in the many distinctions made between clergy and laity, and the prohibiting the first, except some great ones, from meddling with secular affairs, or tribunals. This separation, however, had not yet taken place in England, and it is not a wonder that William, who had peculiar views of his own in it, as I shall observe, thought it reasonable to oblige his benefactor the pope, and to conform the constitution of this church and nation to that of France, where the clergy were a separate body.

THE private views of the king were twofold, the first arose merely from his personal character, his avarice. By the bishop's ceasing to be a judge in the temporal courts, he lost his share of the mulcts or fines imposed therein, and in consequence the king's two-thirds of them were encreased. But his other view lay deeper. To comprehend this, we must remember how great was the ignorance of those ages. Scarce a man, except a clergyman, could read or write, insomuch that being able to read was looked upon as a proof of being in orders. Many even of the greatest lords could not write their names, but signed *marks*; and from this ignorance it was that proceeded the great weight our law gives to *sealing* above *signing* any instrument, and that sealing is what makes it a man's deed. It followed from hence that the laity must be grossly ignorant in point of the laws. Their knowledge could extend no farther than as they remembered a few particular cases, that fell under their own observation; whereas the clergy had the benefit of reading the written laws, and consulting the proceedings thereon, in the rolls of the courts of justice, and they were the only lawyers of the times; insomuch that it became a proverb, *nullus clericus nisi causidicus*.

WHAT method then could so effectually answer the king's end of making the Saxon law fall into oblivion, which he could not openly abolish, after having solemnly sworn to observe it, as the removing from the courts of justice those persons who only knew it, and could oppose any innovation his Norman ministers should attempt to introduce. This policy, however, as artfully as it was laid, had not its full effect; for many of the clergy, unwilling to lose so gainful a trade, appeared still in these courts in disguise, as laymen, and at this time it is very probably conjectured that that ornament of the serjeant at law's dress, the *coiff*, was introduced, and for this very purpose of hiding the tonsure, which would have shewn them to be clerks. This their attendance, in some degree, frustrated the scheme, and many of the Saxon laws, such especially as were repeated in William's, kept their ground, but many more were forgotten.

I MENTIONED that one motive of William's to separate the jurisdictions, was to oblige the pope, to whose favour he owed much, yet it ought to be observed to his honour, that he maintained the independency of his kingdom with a royal firmness. Pope Gregory, commonly called Hildebrand, who was the first that ventured so far as to excommunicate sovereign princes, as he did the emperor no less than four different times, conceiving William could not sit securely on his throne without the aid of his see, demanded of him homage for the kingdom of England, and the arrears of Peter's pence; grounding his claim of superiority on his predecessor's consecrated banner, and that Peter-pence was the service by which the kingdom was held from the holy see. But he found he had a man of spirit to deal with. William allowed the justice of the demand of Peter-pence, and promised to have it collected and paid, not as a tribute, but as a charitable foundation, as in truth it was, to support a college of English students at Rome, for the benefit of the English church. As to *homage*, he absolutely refused it, and declared he held his crown from God alone, and would maintain its independance; and to convince the pope he was in earnest, he issued an edict forbidding, on their allegiance, his subjects to acknowledge any person for sovereign pontiff, until he had first acknowledged him. So bold a step convinced Gregory, who was already sufficiently embroiled with the emperor, that this was no fit time to push things; and so he dropped his project, but
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without retracting it; for the court of Rome never did in any case formally recede from a pretension it had once advanced.

THE consequences of the separation of the ecclesiastical from the temporal jurisdiction were many. It naturally occasioned controversies concerning the respective limits, and these gave rise to the *curia regis* interposing in these matters, and, by prohibitions, preventing one from encroaching upon the other. The great contest was concerning suits for benefices, or church livings, which the clergy contended were of *spiritual*, and the king's courts, of *temporal* cognizance. And this, indeed, was the great question that, in those days, divided the Christian world abroad. However in England, the clergy were, at length, foiled in this point. But a much greater evil arose from this separation. It is a maxim of all laws, that no man should be twice punished for the same crime, and this just maxim the clergy, in favour of the members of their own body, perverted in a shocking manner. If a clerk committed murder, rape, or robbery, the bishop tried and condemned him to penance; and this sentence was made a pretence of not delivering him to the temporal courts, to be tried for his life. This was one of the great disputes concerning the constitutions of Clarendon, in Henry the Second's time, between him and archbishop Becket †.

AT length, about Henry the Third's reign, the limits between the several jurisdictions were pretty well settled, and by subsequent statutes, and judicial resolutions, are confined to the respective limits they are now under. Indeed, since the Reformation, as the credit of the canon law has declined, on account of the dilatory proceedings, and the use of excommunication upon every trifling contempt, the reputation of the ecclesiastical courts has greatly fallen, and prohibitions are now issued, in many cases, where they could not have been granted in former times. Yet, if we examine accurately, we shall find that these great complaints, which, it must be owned, are in the general just, namely, of dilatoriness and excommunications, proceeded from the separation of the two courts by William. Before, when the courts sat together, the sheriff assisted the bishop, and by his temporal power compelled the parties to appear, and submit to the sentence, if they were

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† Madox, Excheq. ch. 1. Bacon on the laws and government of England, part 1. ch. 59. and 66. Brady, Carte and Tyrrel.

contumacious against excommunication. But when they were separated, the bishop was left to his spiritual arms, merely, excommunication; and as the consequences of such a sentence were, in the superstitious times, looked on as very dreadful, and are really severe in law, several intermediate processes and notices were necessary before they proceeded to that extremity; and this gave opportunity to litigious persons to disobey every order the court made in a cause, until they came to the brink of excommunication, and that way, by repeated contumacies, to spin out causes to an unconscionable length. And the want of other arms compelled these courts, on very trifling contempts, to enforce their orders by excommunication, which, it must be owned, according to its primitive and right use, should be reserved only for flagitious immoralities †.

ANOTHER evil consequence that flowed from this separation of these courts, was, that the pope cunningly got his, the canon law, introduced into the ecclesiastical courts, which made him the head of the church, introduced appeals to him, and in effect, robbed the king of so many subjects in ecclesiastical affairs, whereas, before, though there might be references in cases of difficulty for advice to Rome, there were no appeals thither. The *curia regis* was to reform ecclesiastical judgments, and the ecclesiastical, as well as temporal jurisdiction, was the king's.

ANOTHER evil consequence, and it is the last I shall mention, of this alteration, was the setting up two legislatures, if I may say so, in the kingdom. In the antient time all laws were made in the same assembly, but now, the clergy being separated from the laity, when a parliament was called, the business became divided; ecclesiastical matters, and the taxes on the clergy, were handled in the convocation, as temporal matters, and the taxes on the laity, were in parliament. This contributed to the further clashing of jurisdictions. For it must be owned the convocation exceeded their powers, and made canons about things merely temporal; which, however, they contended to be spiritual; and sometimes contrary to the express law of the land, nevertheless they by the superstitious and ignorant, who knew not the distinction between such things, were generally obeyed, and hence from such submission.

† Hale, hist. com. law, ch. 7. Bacon, hist. and polit. discourse, p. 129. &c.

submission it is, that, by custom, in several places, tythes are payable of things that are not tythable at common law.

THE right of the convocation's canons binding the laity in spiritual matters was never doubted in the times of popery, nay till Charles the First's time, if they had the approbation of the king, who was the head of the church, it was the general opinion, except among the Puritans. But since that time their jurisdiction is settled on a reasonable footing. Their canons bind no man, spiritual or lay, in temporal matters. They bind no layman in spiritual matters; but they bind the clergy in spiritual matters, provided that no right of the laity is thereby infringed. As for instance, there is a canon forbidding clergymen to celebrate marriage out of canonical hours. This doth not bind even a clergyman, for if it did, it would strip the laity of their right of being married at any hour. However it is to be considered whether a canon of the convocation is a new ordinance, or only a repetition of the old ecclesiastical law. If the latter, it binds all men, spiritual and lay, not as a canon, but as the law of the land.

LECTURE XXX.

Robert Duke of Normandy, and William Ruffus, dispute the succession to the Conqueror—The English prefer the latter—The forest laws—The cruelty and oppressions of William—The advancement of Henry, the Conqueror's youngest son, to the crown of England—He grants a charter—The nature of this charter—His dispute with Anselm concerning Investitures—The celibacy of the clergy—State of the kingdom under Stephen.

WILLIAM the Conqueror left three sons, Robert, William and Henry. The eldest, Robert, according to the established rules of the French fiefs, succeeded in Normandy, and on account of his primogeniture laid claim also to the crown of England; but what right that gave him, might in those days, well be a question. In the Saxon times the rule was to elect a king out of the royal family, and the election generally fell on the eldest son, though not universally; for the line of Alfred reigned in prejudice to the descendants of his two elder brothers. Edred succeeded to his brother Edmund, in prejudice of Edmund's two sons; again, on Edred's death, his son was excluded, and Edmund's eldest son resigned; and lastly Edward the Confessor was king, though his elder brother's son was living. So that priority of birth was rather a circumstance influencing the people's choice, than what gave an absolute right of succession†.

ANOTHER thing, it might be pretended, should determine this point, that is, as William claimed the crown through the will, as he said, of the Confessor, he also had not a power to bequeath the crown. When, therefore, he was making his will he was applied to on this head, but the approach of death seems to make him acknowledge that his only just title was his *election*, for though he hated his son Robert, and was extremely fond of William, he refused to dispose of it by will. He only expressed his wish that

† Tyrrel's *Introduct.* to his hist.

that William might succeed, and dispatched him to England, with letters to Lanfranc archbishop of Canterbury, requesting him to influence the election in his favour, and he accordingly was crowned. Indeed, it seems a little odd that William, whose bad qualities were universally known (for he had not one single virtue, except personal bravery) should be preferred to Robert, who, with that virtue, possessed all the amiable virtues of humanity.

THAT the native English should prefer any one to Robert is not to be wondered at, as he had, on all occasions, expressed the highest aversion to them, but they had no influence in the matter; and it appears, at first view, the interest of the English lords, most of whom had also estates in Normandy, to be subject to one monarch, and not have their estates liable to confiscation, on taking part with one of the brothers against the other. But the interest of Lanfranc and the clergy, added to his father's treasure, which he had seized, and distributed liberally, bore down all opposition; and indeed, it is probable that Robert's disposition, which was well known, operated in his disfavour; for his extreme indolence and prodigality, and his scruples of using improper means for attaining the most desirable ends (whereas William was extremely active and would stick at nothing) made it easy for persons of any penetration to see in whose favour the contest between the two brothers must end †.

WE have little to say of the laws in his time, for he regarded no laws, divine or human, ecclesiastical or temporal. He chose for judges and courtiers the most profligate persons he could find. And one of the great oppressions his people laboured under was the extending, and aggravating the forest laws. The *forests* were large tracts of land, set apart by his father for the king's hunting out of the royal demesnes; and consequently William his father had by his own authority, made laws, and severe ones, to be observed in these districts for the preservation of the game, and erected courts to try offenders, and trespassers in his forests. The great intention of these courts was to fleece his subjects, who were as fond of hunting as their sovereign, by mulcts and fines; and in truth, these were the only oppressions his countrymen, the Normans, suffered under the Conqueror.

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† Carte, vol. i. p. 452, 453.

BUT Ruffus flew out of all bounds. He introduced the *lawing*, as it is called, the Hamstringings of Dogs; nay, he made a law, by his own authority, to make the killing of a deer capital. On pretence of this law he seized many of the great and rich, confined them for years, without bringing them to trial, until he forced them to compound, and to give up the better part of their estates. Not content with harassing the laity, he laid sacrilegious hands on the church revenues. Whenever a rich abbey, or bishoprick, fell vacant, he laid his hands on the temporalities, kept them vacant for years, as he did that of Canterbury four years; and even, when he was prevailed upon to fill them, he openly set them to sale in his presence, and gave them to the best bidder. However, in a violent fit of sickness, he promised to reform, and did till he recovered his strength, when his reformation vanished. The remonstrances of his clergy, or the pope, had no effect with him; and, indeed, the circumstances of the times were favourable. For as there were two popes, one made by the emperor, the other, by the Romans, who disowned the imperial authority in that respect, William acknowledged neither, and each was afraid to drive him into his adversaries party, by proceeding to extremities.

THESE enormities raised him so many enemies among his subjects, of all kinds, that Robert had a strong party, and an insurrection was begun in his favour, which William, profiting of Robert's indolence, easily suppressed, and then invaded him in Normandy, and was near conquering it, as, by a sum of money, he detached the king of France from the alliance, if he had not been invaded by Scotland, in favour of Robert. He patched up, therefore, a peace with him, ratified by the barons on both sides, the terms of which were, that the adherents of each should be pardoned, and restored to their estates, and the survivor succeed to the other†.

THUS there was a legal settlement of the crown of England made, which ought to have taken place, but did not. For William being accidentally killed in hunting, while Robert was absent in Italy, on his return from the holy war, Henry the youngest son, took the advantage, and seizing his brother William's treasure, was crowned the third day, after a very tumultuous election, the populace threatening death to any that should oppose him.

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† Kennet's historians, and Carte,

The reason of their attachment to him was, that he was, by birth, an Englishman, and therefore, they hoped for milder treatment from him than they had met from his two Norman predecessors. Besides he had promised a renewal of the Confessor's laws, with such emendations as his father had made. And in pursuance of this promise, as soon as he was crowned, he issued a charter, containing the laws as he now settled them, and sent copies of it to every cathedral in his kingdom.

THESE laws were, as to the bulk of them, the old Saxon constitutions, with the addition of the Conqueror's law of fiefs, and some things taken from the compilations of the canon law. However, with respect to the feudal law, he, in many instances, moderated its severity. With respect to *reliefs*, he abolished the arbitrary and heavy ones which William had exacted, and restored the moderate, and certain ones, which his father had established. With respect to the *marriage* of his vassal's children, he gave their parents and relations free power of disposing of them, provided they did not marry them to his enemies, for obviating which, his consent was to be applied for, but then he expressly engaged not to take any thing for his consent; and the *wardships* of his minor tenants he committed to their nearest kindred, that they might take care of the persons and estates of the ward, and account with him for the profits during the minority, upon reasonable terms. He even, in some degree, restored the Saxon *law of descents*, and permitted alienation of lands. For if a man had several fiefs, and several sons, the eldest had the principal one, on which was the place of habitation, only, and the rest went among the sons, as far as they would go; and if a man purchased or acquired land (as land might be alienated by the feudal law, with the consent of the superior lord,) such acquisitions by the laws of Henry, he was not obliged to transmit to his heirs, but might alien at pleasure†.

THIS mitigation of the former law was very agreeable to his people, both English and Normans. The former were pleased to see the Saxon law so nearly restored, and the latter, harrassed with the oppressions of William, were glad to have the heavy burthens of their tenures lightened; and in-

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† Hale, hist. com. law, chap. 7. Carte, vol. 1. p. 480. et seq.

deed, began, by degrees, to relish the old English law, and to prefer it to their own.

To attach the bulk of his subjects to him still more strongly, he took another very prudent step. He married Maud the daughter of the king of Scotland, by Edgar Atheling's sister, so that in his issue the blood of the Norman and Saxon kings were united. But still he was not firmly settled, until the affairs of the church, and the right of lay persons granting investitures of church livings were settled. He intended to proceed in the same manner that his father and brother had done. He accordingly named persons to the vacant bishopricks, and recalled Anselm, archbishop of Canterbury, who had lived in exile during the latter part of William's reign, on account of the then famous dispute of lay investitures. But Anselm, adhering to the canons of a council held at Rome, refused to consecrate the bishops named by the king, and also to do him homage for the temporalities of his own see, which the king required before he gave him possession.

HENRY, afraid of detaching from himself, and attaching to his brother Robert, the pope and so powerful a body as the bulk of the clergy, with so popular and high spirited a priest at their head, was obliged to propose an expedient, that he should send ambassadors to the pope, to represent that these canons were contrary to the antient law and customs of the nation, and to endeavour to obtain a dispensation for not complying with the canons; and that, in the mean time, Anselm might enter into the temporalities of his see. This proposal was accepted. But, though the king's desiring to do that by dispensation, which he had a right to do by law, was tacitly giving up his cause, the pope knew his own strength, and Henry's weakness too well, to grant this favour. He insisted on the canons being executed, which produced another quarrel between the king and archbishop. The archbishop, attended by other bishops his adherents, went to Rome to complain. The king sent new ambassadors, but all in vain. The pope proceeded to threaten excommunication, which, in those days of superstition, would have tumbled Henry from the throne, so he was obliged to submit, and come to a composition. He renounced the nomination and investiture *per annulum & baculum*, restored the free election of bishops and abbots

abbots to the chapters and convents, which, as the pope was judge of the validity of such elections, was, in effect, almost giving them to him; and, in acknowledgment of his antient right of patronage, was allowed the custody of the temporalities during the vacancy; was allowed to give the *cong   d'elire*, or license to proceed to election, without which they could not elect, and was allowed to receive homage from the elect, upon the restitution of the temporalities.

THUS the pope gratified the king with the shadow, and gained to himself and the church the substance, and thus, at this time ended, that contest in England, which had cost so many thousand lives abroad, between the pope and emperors. Henry, however, retained a considerable influence in the elections, for before he issued his *cong   d'elire*, he generally convened his nobles and prelates, and with them recommended a proper person, who generally was chosen; and this the pope, for the present, suffered to pass †.

I HAVE little else to observe touching the laws in this reign, save what pertains to the *celibacy of the clergy*. The popes, aiming at detaching the clergy entirely from secular interests, had made many canons against their marrying, and all the eloquence of some centuries had been employed in recommending celibacy. These canons, however, had not their full effect in England; for very many of the secular clergy were still married. Anselm, in a synod he assembled, enacted a canon against them, commanding them to dismiss their wives, upon pain of suspension, and excommunication, if they presumed to continue to officiate. Cardinal de Creina was afterwards sent legate by the pope to England, where, in a general assembly of the clergy, he re-enacted the canons against their marriages, and presiding in a lofty throne, uttered a most furious declamation against such a sinful practice, declaring it a horrid abomination, that priests should rise from the arms of a strumpet, and consecrate the body of Christ. And yet the historians assure us, that, after consecrating the eucharist in that assembly, he was found that very night in the stews of Southwark, in bed

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† Carte; and Kennet's historians.

with a prostitute ; which made him so ashamed, that he stole privately out of England †.

HENRY, though he had subdued Normandy, and kept his brother Robert in prison, was not without uneasiness as to the succession to his dominions ; for Robert's son was an accomplished prince, and protected by the king of France, whereas his own bore but a worthless character. However, to secure the succession to him, he assembled the barons of Normandy in Normandy, and those of England in England, and prevailed on them to take the oath of allegiance to him as such. But he being soon after drowned, the king, in hopes of male issue, took a second wife, and after three years fruitless expectation, he turned his thoughts to making his daughter Maud his heir, and did accordingly prevail on his nobility to take the oath of allegiance to her as successor. But one of the steps he took for securing the throne to her, in fact, defeated his scheme. He knew that a woman had never yet sat on an European throne, that Spain, which was the only nation that admitted persons to reign in the right of females, had never suffered the female herself, but always set up her son, if he was of a competent age ; if not, her husband. As to the circumstances of his own family, his grandson was an infant, and neither he nor his daughter had confidence in her husband. He knew that this oath was taken against the general bent of his people, and that little dependance could be had on it when he was gone, so easy was it to get absolution. His chief dependance was on the power and influence of his natural son Robert, who, indeed, did not disappoint him, and of his nephew Stephen, and of his brother Roger, bishop of Salisbury, on all of whom he heaped wealth and honours.

STEPHEN, thus advanced, began to lift his eyes to the crown. He, as well as his cousin Maud, was a grandchild of the Conqueror, and descended from the Saxon kings ; and he had the personal advantage of being a male, and bearing an extraordinary good character. By his ability and generosity he had become exceedingly popular, and his brother Roger secured the clergy in his interest. Immediately on his uncle's death, he seized his treasure, which he employed as Henry had done William's, and having spread a report that Henry, on his death bed, had disinherited Maud, and made him

† Kennet's historians. Hume, vol. I. p. 243.

him his heir, he was crowned in a very thin assembly of barons. Sensible of his weakness, he immediately convoked a parliament at Oxford, where, of his own motion, he swore, not only to rule with equity, but that he would not retain vacant benefices long in his hands, that he would sue none for trespassing in his forests, that he would disforest all such as had been made by the late king, and abolish the odious tax of *Danegelt*; concessions, which, with the pope's approbation of his title, so satisfied the people, that all the lords and prelates who favoured Maud, and had kept aloof, and among them Robert her brother, came in, and swore allegiance to him as long as he kept these engagements; from which conditional oath they expected he would soon release them, and indeed they did all they could to provoke him to it. This bait taking, and he having disobliged his brother and the clergy, Maud's friends rose in her favour; and made the kingdom for many years a field of blood †.

IN one of these battles Stephen was taken, and Maud was universally acknowledged; but her insufferable haughtiness, her inflexible severity to her captive, and her haughty refusal of the city of London's request, to mitigate her father's laws, and restore the Saxon, so alienated the people from her, that she was forced to fly from London, and arms were again taken up for Stephen. Her brother, who was the soul of her cause, being soon after taken prisoner, was exchanged for Stephen, and he dying soon after, Maud was forced to leave the kingdom to her competitor. However, Stephen continuing still embroiled with the clergy, her son Henry, in a few years after, invaded England, and was joined by multitudes; but some noblemen, who loved their country, mediated a peace, and at last effected it on the following terms; that Stephen should reign during life; that Henry should succeed him, and receive hostages at the present for the delivery of the king's castles to him on Stephen's death; and that, in the interim, he should be consulted with on all the great affairs of the kingdom; and this agreement was ratified by the oaths of all the nobility of both sides. In this treaty no mention was made of Maud's title, though she was living ‡.

† Bacon, hist. and polit. disc. p. 103, &c. Carte, vol. I. p. 525. et seq.

‡ Kennet's historians.

LECTURE XXXI.

Henry II. succeeds to the crown—The reformation of abuses—Alterations introduced into the English Law—The commutation of services into money—Escuage or Scutage—Reliefs—Assizes of novel disseisin, and other assizes.

UPON Stephen's death, Henry the Second succeeded, according to the settlement of the crown before made, and came to the possession of the kingdom with greater advantages than most kings ever did. He was in the flower of youth, had an agreeable person, and had already given the most convincing proofs both of wisdom and valour. He was by far the most powerful prince of his time : For, besides England, which when united to its king in affection, was, by the greatness of its royal demesnes, and the number of knights fees, incomparably the mightiest state in Europe, in proportion to its extent ; he had in France, where he was but a vassal, greater territories than the king of France himself. In him were united three great fees, to each of which belonged several great dependancies ; Anjou, which came from his father ; Normandy from his mother, and Guienne by his wife. And, from the very first steps he took on coming to the throne, his subjects had good foundation to hope that this great power would be principally exerted to make them happy. The whole reign of Stephen, until the last pacification, had been a scene of dismal confusion, in which every lord of a castle tyrannized at pleasure, during the competition for the crown ; and though, from the time of the settlement of peace, Stephen published edicts to restrain violence and rapine, and made a progress through the kingdom, in order to re-establish justice and order, he lived not long enough to see his good intentions answered, but left the work to be accomplished by his successor.

THE first thing Henry did was to discharge a multitude of foreigners, whom Stephen kept in arms during his whole reign. His next care was the reformation of the coin, which had been greatly debased. He coined money

money of the due weight and fineness, and then cried down the adulterated which had, in the late reign, been counterfeited by the Jews, and the many petty tyrants in their castles. These to humble, and make amenable to law, was his next concern. As to the castles in private hands, that had been erected in his grandfather's time, or before, he meddled not with them; but all that had been built during Stephen's reign, either by permission or connivance, through the weakness of that prince, which were the great nuisances, he issued a proclamation for demolishing, except some few, which, from their convenient situation, he chose to keep in his own hands, for the defence of the realm. And, lastly, as the crown had been greatly impoverished by the alienations Stephen had, through necessity, been forced to make, he issued another, to renounce all the antient demesnes that had been so alienated, that he might be enabled to support his dignity without loading his people, except on extraordinary occasions†.

THESE reformatiions, however just in themselves, or agreeable to the subject, he did not proceed on merely by his own authority. He had deliberated with the nobles, who attended at his coronation, concerning them, and had their approbation; and though there were no acts of parliament made at that time, yet, as form in those days was less minded than substance, these edicts had the obedience of laws immediately paid them by all, except some mutinous noblemen, who still held their castles in a state of defence. Having taken these prudent steps, he formed his privy council of the best and wisest men of the nation, and by their advice summoned a regular parliament, wherein many good regulations were made. The laws of the Confessor, as amended by Henry the First, were re-established, and every thing, both in church and state, settled on the footing they were in the time of that king. Being thus armed with a full parliamentary authority, he marched against his mutinous nobles, whom he soon brought to submit; and demolished their castles.

In another parliament, in order to settle the succession, contests about which had had fatal effects ever since the death of the Conqueror, he prevailed on his subjects to take the oath of allegiance, to his two sons, though both in their infancy, first to William, then, to Henry, as his successors.

And

† Hale, hist. com. law, chap. 7. Carte.

And having taken all these wise and just measures, for the peace and security of his kingdom, he repaired to his foreign dominions; but his transactions there, or even at home, that do not relate to the laws or constitution, are not within the compass of the design of these lectures. Let it suffice to say, that he made as good laws for, and was as good a sovereign to, his French as his English subjects.

In his reign many were the alterations introduced into the English law, most of them, no doubt, by act of parliament, though the records of them are lost. For, in the beginning of his reign, as I observed, he enacted in parliament the laws of Henry the First; and yet from the book of Glanville, written in the latter end of his reign, it is plain there were great changes, and the law was very much brought back to what it was in the Conqueror's reign; nay, in one respect, to what it was in Rufus's, I mean reliefs, the law of which I shall mention hereafter. Many likewise were the regulations he introduced of his own authority, which in the event proved very beneficial to his subjects.

THE first I shall take notice of was his commutation of the services due of his tenants in demesne, which formerly were paid in provisions and other necessaries, into a certain sum of money, adequate to the then usual price. His grandfather Henry did somewhat of this kind, but he it was that established and fixed it; and his example was followed by his lords, so that, from this time, rents became generally paid in certain yearly sums of money, instead of corn and provisions. What advantage the successors of these socage tenants gained thereby will be evident, if we consider the price of things at or about that time. In the reign of Henry the First, we are told, the current price of several commodities, which, however, must be trebled when reduced to the money of our standard, were as follows: That of a fat ox five shillings, of our money fifteen; a wether four-pence, of ours, a shilling; wheat to serve an hundred men with bread for one meal, a shilling, of ours, three shillings; a ration for twenty horses for a day, four-pence, of our money a shilling. And although we should allow that, in Henry the Second's time, the prices of things were even doubled, which is impossible to be admitted, it is easy to see how greatly the future socage tenants,

tenants paying the same nominal rent, the value of which was daily decreasing, rose in wealth and importance. Besides, they were greatly eased in point of the expence and trouble of carrying the provisions to the king's court, to which before they were obliged, wherever he resided in England; whereas, now, they had only to carry, or send by a proper messenger, the money to be accepted as an equivalent †.

His military tenants he eased in a much more considerable manner. By the law of the Conqueror, every military man was obliged to serve at his own expence forty days as well abroad, where the king's occasions required, as in England, and in person too, unless notoriously incapable; in which case they were obliged to find each a deputy, and if they failed herein, by the strictness of the feudal law, they forfeited their lands, or rather, as the law was used in England, compounded at the king's pleasure; which, if he was very avaricious, came pretty near the same thing. This was a miserable heavy grievance. For what oppression must it be for a knight of Northumberland, who had, perhaps, but a single fee, to transport himself, it may be, to Guienne, to serve forty days, and then return? Nay, it was inconvenient to the king himself; for as France, where the scene of the king of England's wars generally lay, was every where full of fortifications, it was scarce possible to finish a war in forty days, however great the humour of that age was for pitched battles; the consequence of which was, that, after that time, the king was ever in danger of being left in the midst of a campaign, with an inferior army.

HENRY then, sensible of these inconveniencies, both to himself and his subjects, devised *escuage*, or *scutage*, in the fourth year of his reign, upon account of his war with Toulouse upon which his wife had some pretensions. He, knowing that this war required but a small part of his force, did, both in Normandy and England, publish, that such of his military tenants as would before-hand pay a certain sum of money, should be excused from serving, either in person or by deputy; and this sum, which was rated by him extremely moderately, and was, therefore, generally paid by his vassals, rather than serve in so remote a place, he employed in hiring mercenary soldiers of fortune, of whom there was plenty on the continent; and those,

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† Gervas. de Tilbury, dial. de Scaccario.

by their engagement, were obliged to serve during the continuance of the war †.

THAT his sole view, in this new project, was the ease of his people, and the better prosecution of his wars, and not the depressing the military spirit of his subjects, appears from hence; that those who were qualified, and chose to serve in person, he caressed, and encouraged by all means possible; that he never brought a single mercenary into England, when he had wars with Wales or Scotland, but insisted on his subjects personal service; nay, that he never kept those mercenaries on foot in his foreign dominions, but dismissed them as soon as the war was at an end. And this of *scutage* was the general method he followed in his subsequent wars in France and Ireland. What wonder is it then, that this prince was universally beloved by his people of all ranks? though, as the best institutions are liable to be corrupted, this very *scutage*, that he devised for public ease, was turned into an heavy engine of oppression by his son John.

ANOTHER alteration in the law in the reign of this king, was the point of *reliefs*, as I mentioned before. The old relief of William the First, which was restored by Henry the First, was certain, to all lords and knights, according to their degrees, and was paid in horses and arms; but now the humour of the times being that every thing should be paid in money, the relief of a knight's fee was settled at one hundred shillings, the fourth part of its then computed yearly value, and which I suppose was about the price of the armour, a knight was before to pay; and henceforward the arms of the deceased descended to the heir, and consequently the coats of arms blazoned thereon became hereditary. But the reliefs of barons, or earls, were not settled at this time, but remained arbitrary, as Glanville informs us. *De baroniis & comitatibus nihil certum est statutum, quia juxta voluntatem et misericordiam domini regis solent baroniæ capitales de relevis suis domino regi satisfacere* †.

FROM the word *statutum* I take it for granted this change of reliefs into money was by act of parliament. Indeed, how could it be otherwise; but, then,

† Madox, hist. of Excheq. ch. 16.

‡ Lib. 9. c. 4.

then, the most surprising circumstance is, that the great lords, who, in that age principally composed the parliament, should take care in this material point, of the knights, the lower military tenants, and leave themselves at the mercy of the crown. I shall venture on conjecture to assign the reason. The Conqueror settled the reliefs of earls and barons at a certainty, because he had fixed the number of knights fees they should contain; twenty to an earldom, and thirteen and two-thirds to a barony; but by the time of Henry the Second, the number of knights fees contained in them might be greater or less. For instance, if an earl died, and left two daughters, his twenty fees would be divided equally between them; but the dignity was to go to the husband of that daughter the king chose. Now it would be hard that he should pay for ten knights fees, merely because he had the same title, as much as the predecessor paid for twenty. Again, in the new created honours, it seems very probable, from many circumstances, that an earldom might be erected but with fifteen knights fees, or, perhaps, with twenty-five. The certainty of the *quantum* of land an earldom or barony should consist of not being settled, I imagine, was the reason that the *quantum* of relief was not expressly determined, though, by fixing that of a knight's fee, the reasonable relief might, in any case be easily determined. And that Henry, and his son Richard, exercised that discretion the law left in them in this equitable manner, we may infer from there being no complaints, as to reliefs, from the earls or barons, during their reigns; but John revived the arbitrary relief of William Rufus, to the great oppression of his nobles, until he was restrained by *Magna Charta*.

To no other reign than this, I think, can be ascribed, so properly, the invention of *assizes of novel disseisin*, and the other *assizes*, for obtaining possession of lands. By the strictness of the very antient feudal law, if a man had been disseized, that is, turned out of possession, if he did not enter, and regain his possession, or, at least, claim it within a year and a day, he lost all right; for, if he was a socage tenant, the possessor had, within that time, paid a rent to his lord, and been by him, who was supposed the best judge, allowed to be the rightful tenant; and, if he was a military one, it was probable, in those ages of perpetual war, he had actually served, at least he had kept himself in constant readiness if called upon. But the limitation of a year and day being soon found too short, it was after extended to five years;

then, to the time of the possession of the disseizor himself, namely till he had either died or aliened it. But upon the alienée, or heir of the disseizor, he could not enter, because they came in honestly, by a fair title, and were guilty of no wrong. However, this antient law, that gave no remedy but by entry, during the seizor's possession, was still too severe; for the *disseizor* might alien, or die suddenly, before the *disseizee* could enter, or he might hold the possession *manu forti*, so that the disseizee might not be strong enough to enter and recover his possession †.

To remedy these evils, and to prevent bloodshed, the law provided for the disseizee his right of action, either against the disseizor himself, or his heir or assigns, and, in which, upon shewing his right to the land, he should be restored to his possession by the king's officer, the sheriff, with the *posse* of the county. But still this action was hitherto but the *writ of right*, which meddled not with the unlawful possession, only with the absolute right to the land, and this action, if brought in the *curia regis*, where only impartial justice could be expected; was very dilatory. It was dangerous also, as the tenant in possession might offer battle. In this reign, then, were these *possessory actions* introduced, for the determining the point of possession, leaving the right of propriety as it was. It was advantageous likewise to the subject, both disseizor and disseizee, as it gave him two trials for his lands; for the writ of right when once determined was final and conclusive ‡.

THIS distinction between the *right of possession*, and the *right of propriety* was borrowed from the civil law, which was first introduced in the late reign, and was now, and for some time forward, studied with great assiduity by the English, as appears from the many long transcripts from it to be found in the books of our antient lawyers. There they found the distinction of *actions possessory* and *petitory*; *possessory* when a man had been notoriously in possession, and reputed the owner, and was put out by another of his own authority. The public peace was concerned to protect the possession of the reputed owner, and not to let him suffer the loss thereof while he was suing his petitory action, that is on the mere right, which the other undoubtedly would delay, by all the arts and shifts he could invent. The proceedings,

† Coke on Littleton, fol. 153.

‡ Ibid.

ceedings, therefore, in possessory actions were summary and expeditious; for they only regarded the possession, and did not determine the absolute right: so there was no conclusive wrong done to either party, let the matter of possession be decided how it would; for he that failed might bring his petitory action for the right.

AN *assize* in our law was a very summary action. Bracton, who lived an hundred years after, calls it *novum & festinum remedium*, and indeed so *festinum* was it, that, in its proceedings, it seems to depart from the general rules of reason and all laws. For it is a maxim of all laws, except in some few very extraordinary cases, that no proofs are to be taken till an *issue* is joined, as our law calls it, or till there is a *contest*, as the civil law expresseth it; that is, till it is settled what is the matter to be proved, or till there is something affirmed on one side, and denied on the other, upon which the merits of the cause turn. If there be no disagreement about *facts*, but the question is mere *matter of law*, the judges, who are best acquainted therewith, are, by our law to determine. If the question be matters of fact, or facts mixed with law, the jury, assisted with the judges, are to determine; though if they doubt about the point of law, they may find the facts specially, and leave the law arising thereon to the judges, which is what we call a *special verdict*. No jury, therefore, ought to have been summoned till the defendant appeared, and issue was joined, so that it was known what was the matter to be tried; and this is the general rule. But, for the speedy settling and quitting possessions, the assize is an exception thereto, as appears from the *writ of assize* directed to the sheriff. For, besides giving notice to the defendant, or *tenant*, as he is called in this action (because he is in possession) the sheriff is immediately to summon a jury or assize, as it is called upon this occasion, who shall directly go to the place, and make themselves judges, by their view, of the nature, quality, and quantity of the land, or thing demanded, and inform themselves, by all the ways they best may, of the former possession of the demandant, and how he came to lose it. They are then to appear the same day with the demandant and tenant, and, when issue is joined between them, are to determine the matter according to their own prior knowledge, and the evidence then given before them. I observed that this action is not final. A brings an assize against B. If judgment be given for A, B may bring his *writ of right*, if he has the right of propriety,

ty, and recover, and so *e contra*. But though B cannot deny his disseizing A, he may still defend himself. The words of the writ are *injuste, & sine judicio, disseizivit*. He may therefore shew that he disseized A, justly, that is, that he had a right of entry. As, suppose B was first in possession, A disseizes him; then B, as he lawfully may, disseizes A, A shall not recover. But if B had been in possession, and A's father had disseized him, and died, so that the land has come to A, who is innocent, B, not entering in the father's life-time, has lost his right of possession. It is so in A. Now if B disseizes A, the son, though he had ever so good a right to the land, A shall recover the possession; for B had no right to enter, though he had a right to recover the possession he was deprived of by A's father, by bringing an action. Wherever a man comes innocently to a possession, the law will defend that possession, until it is proved that he hath no good right to it †.

† Bracton, lib. 4.

L E C T U R E XXXII.

The institution of Judges itinerant, or Justices in Eyre—The advantages attending it—The jurisdiction of these Judges—Their circuits—The present form of transacting the county business—The division of the Curia Regis into four courts—The jurisdiction of the court of King's Bench.

THE greatest and most beneficial step taken by Henry the Second, was the institution of *judges itinerant*, or *justices in eyre*, as they were called, from the Norman word *eyre*, equivalent to, and derived from the Latin *iter*. I observed before, that almost all businesses relative to the administration of justice were, in the Saxon times, transacted in the county, and hundred, that the leet and manor courts were held in the county, near the suitors doors, and that none but the causes of the great lords, or such as were of difficulty, were handled in the *curia regis*. Under the reign of the Conqueror, I took notice, that the administration of other causes was facilitated in the king's great court, and that, consequently, the business of the inferior courts began to decay; and I laid open the motives William had for that conduct, the introduction of the Norman, and suppression of the Saxon law. But the scheme succeeded in the same manner as his other one did, of rooting out the English language, and introducing his own in lieu thereof. As *this* produced a new language, from the mixture of both, so *that* caused the English law to consist henceforward partly of feudal, partly of old Saxon customs. However, the causes of most persons were still determined in the inferior courts; for they were but few who were able to undergo the trouble and expence of suing in the *curia regis*, especially, as all persons, whose causes did not properly belong to the cognizance of that court, were obliged to pay a fine for declining the proper jurisdiction, and for having licence to plead in the superior †.

BUT by this time the decisions of those courts, where the freeholders were judges both of law and fact, had fallen into great and just dispute, had

† Hale's hist. Com. Law, chap. 7. Dugdale, orig. jurid. p. 27. Hoveden, p. 590.

had occasioned many mischiefs, and were likely to produce many more. The reasons, as they are delivered by lord Hale, were principally three: First, the ignorance of the judges in the law: for as the freeholders in general were Saxons, they must be supposed to be entirely ignorant of the feudal law, which was now introduced with respect to titles in lands; or, if they did know any thing of it, it is not probable that they would prefer that to their own customs. Nay, the Norman freeholders could be of little service in this point, considering their illiteracy, their education being confined solely to arms, as also their frequent absence almost every year to attend their lords in war. With respect to the Saxon law also, it could be little expected that it should be regularly observed, now that the clergy, who only were acquainted with it, were removed, and none of the judges could possibly know more than an illiterate jurymen at this day, who could neither read nor write, might be able to pick up by attending a court held once a month. How inadequate such a knowledge would be, even in those times, when the laws were comparatively few, need not be enlarged on.†

It is true, some remedies were applied to obviate the bad consequences of this ignorance; but they were very ineffectual. It was required that the sheriff, who presided, should have some skill in the laws, but notwithstanding, he was seldom found to have any; and if he had, it was not very probable, as he was a Norman, that the jury would pay much regard to his direction in giving their verdicts. As a further remedy to this ignorance, by the laws of Henry the First, the bishop, the barons, and the great men of the court, that is, the king's immediate tenants, were ordered to attend. But the bishop, in obedience to the canons, applied himself solely to his ecclesiastical jurisdiction; and the others were generally in the king's service; so that they could but seldom attend, and if they did, they could do but little service, being almost all bred to nothing but the sword, and as illiterate as any other set of men.

THE next mischief, and which flowed from the former, was, that this bred great variety of laws in the several counties, whereas the intention of the Confessor in his compilation, and of his successors afterwards in theirs, was, to have one uniform certain law, common to the whole kingdom. But
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† Hale's hist. Com. Law, ch. 7.

the decisions, or judgments, being made by divers courts, and by several independent judges, who had no common interest, or communication together touching the laws, in process of time, every several county was found to have several laws, customs, rules, and forms of proceeding; which is always the effect of several independent judicatories, administered by several judges. And, indeed, this I look upon to be one of the great causes of very many local customs in many parts of England, different from, and derogatory to, the general common law.

BUT the third and greatest evil, was the frequent injustice of the judgments given in those petty courts, and every business of any moment being carried by parties and factions. The contest about the crown had been carried on with such violence, that one half of the people, all over the kingdom, were professed enemies to the other; and though both sides, wearied with war, came into the expedient of Henry's succession, and he behaved so that there were no factions against him, yet as to individuals, the sense of past injuries, and the rancour arising from thence, still remained. For the freeholders being the judges, and these conversing with one another, and those almost entirely of their own party; and being likewise much under the influence of the lords, every one that had a suit there sped according as he could make parties; and the men of great power and interest in the county did easily overthrow others in their own causes, or in such wherein they were interested, either by relation, tenure, service, dependance, or application. True it is, the law provided a remedy for false judgments given in these courts, by a *writ of false judgment* before the king, or his chief justice; and in case the judgment given in the county court was found to be such, all the suitors were considerably amerced. Yet this was insufficient for the purpose: For, first, it was too heavy and expensive for many that were aggrieved; next, it was hard to amerce all for the fault of a few, *viz.* the jury, who gave the verdict; and the amercement, though sometimes very severe, being equally assessed, on all the freeholders, was not a sufficient check upon the injustice of some juries†.

THE king therefore took a more effectual course; and, in his twenty-second year, by advice of his parliament, held at Northampton, instituted

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justices.

† Fitzherbert, Nat. brev. p. 41.

justices itinerant. He divided the kingdom into fix circuits, and to every circuit allotted three judges, men knowing and experienced in the laws of the realm, to preside in such cases as were of consequence, and to direct the juries in all matters of law. They were principally empowered to try *assizes*, that is, as I explained in my last lecture, the rights of possession, which had been notoriously invaded in the last reign; and which, from the continuance of the old parties, could not even, in this reign, be fairly determined in the inferior courts †.

NOT that this was their sole business; for they had in their commissions power to enquire into several other matters, such, particularly, as the king found, by the advice he had received from the several counties, to be evils not likely to be remedied in the county courts. These were, before every commission for justices itinerant in eyre went out, digested under certain articles, called *Capitula Itineris*, or *The chief heads of the eyre or circuit*, which specified what actions they were to deal with. These were, in general (for the commissions varied at different times, being sometimes more, sometimes less extensive) *civil* and *criminal* actions, happening between party and party; actions brought at the suit of the crown, either for public crimes, or the usurpation of liberties, franchises, or jurisdiction from the crown, which had been very frequent in the former times of confusion; and also the escheats of the king.

THE thing I find most remarkable is, that, in these distributions of England into circuits, are omitted some counties, (I do not mean Middlesex, where the *curia regis* sat, or Chester, which was a county palatine, for they of course were not to be included) as particularly Lincoln, in the second eyre; also York, in the second eyre, is but one county, whereas, in the first, it is two, York and Richmond; as in Lancashire also, Lancaster, and Copeland; and Rutland is omitted in both. All which shews, that the limits and divisions of all the counties were not ascertained with precision at that time. The second eyre was instituted three years after the first, by parliament also held at Windfor, and in this there were but four circuits.

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† Dugdale, orig. jurid. chap. 20. Madox, hist. of Exchequer, chap. 3. § 10. Bracton, lib. 3. chap. 10, 11. M. Paris, an. 1176.

After these two first, the king appointed the circuits, and distributed the counties at his pleasure.

THE usual times of their going was once in seven years. However, they were not stated certainly; for sometimes, if there was a more than ordinary complaint of want of justice, they went every three or four years, and sometimes, if there was no complaint, they were intermitted beyond seven. Neither was the number of judges sent on the circuits fixed, but alterable at the king's pleasure.

THE determinations in these circuits, being under the inspection of men of integrity and skill, were in high estimation, and accordingly are several times quoted by Bracton, as being of as great authority as the decisions in the *curia regis*; and in consequence thereof, the business in the county courts continually declined; justice was every day administered worse in them, and at length they were confined, except in some cases, to pleas under forty shillings. Nay even these were, upon application, easily removable by a writ called a *pone*, into the king's courts†.

BUT as the hopes of obtaining justice in the inferior courts waxed every day more faint, it was found necessary, during the intervals of the eyres, to substitute other courts in their place. Hence the invention of *justices of assizes*, of *oyer and terminer*, of *goal delivery*; and the necessity of affairs afterwards obliging these to be sent very frequently, it was thought fit, about the end of Edward the Third's reign, to lay aside the justices in eyre, as superfluous, since these other did their business, except as to pleas of the king's forests, where the *eyres* were continued. And, in process of time, to prevent the enormous expence of bringing juries up to the king's courts, the justices of the *nisi prius* were instituted, to try issues joined in the king's courts, and the verdicts so found to return to the court from whence the record was brought; which court, on the record so found, proceeds to judgment. These are the judges who now transact the county business in their circuits, under the several commissions before-mentioned; and going regularly twice every year for that purpose, the whole business they transact is, in common speech, called *Assizes*; that being, in the an-

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† 4. Instit. p. 184, 266. Hale, hist. com. law. chap. 7.

tient times of their institution, the principal part of their employment, though now such actions are scarce ever brought ; personal actions, which may repeatedly be tried, having superseded them†.

ABOUT this time, also, it seems that the *curia regis*, the business there increasing, was divided, for the more convenient dispatch thereof, into four courts ; and to each its separate jurisdiction allotted. The exchequer, indeed, was in some sort a separate court before, and had its distinct business of the province ; and in it the treasurer, not the *Iusticiarius Angliæ*, presided, as he did in the other courts. It is not impossible that, before this time, they had, in the *curia regis*, set apart different days for different kinds of causes. But they were all, in one respect, the same court ; because they had the same judges, namely, all such nobles as attended the court. But this being found inconvenient, as these great men were generally ignorant in law, and business began to encrease, it was found proper to appoint settled skilful judges, and to divide the court, and appoint each part its separate jurisdiction. However, those limits were not exactly settled, or, at least, not exactly observed, for some time after : For we find in John's reign, that *common pleas*, that is, civil suits between party and party, and particularly fines of lands, which are of the same nature, were held in the King's Bench ; though, on the contrary, we find no pleas of the crown tried in the court of Common Pleas. I suppose the reason was, that the latter being derived out of the former, the king's bench had a concurrent jurisdiction with it, until restrained by that branch of Magna Charta, *Communia placita non sequantur curiam nostram*. The first of those courts in dignity and power, especially while the *Iusticiarius Angliæ* remained, was the *King's Bench*, though of late days the Chancery hath over-topped it. Here, as the king used frequently, in the antient times, to sit in person, the king is supposed always present ; which is the reason why a blow given in this court, upon any provocation whatsoever, is punished with the loss of the hand, as it is done in the presence of the king. The proper jurisdiction of this court is causes where the king is either directly or indirectly concerned, except as to his revenue‡.

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† 2. Instit. p. 24. et seq. 4. Instit. p. 162. Selden's notes on Hengham.

‡ Dugdale, orig. jurid. chap. 17.

IN all *pleas of the crown* therefore, that is, suits of the king to punish offences, as indictment of treason, felony, breach of the peace, are proper subjects for this court. He is indirectly concerned in this, that all erroneous judgments, given in the Common Pleas, or other inferior courts, are here reformed; for the king is concerned to see justice done to his subjects.

SECONDLY, for the same reason, this is a proper court to grant prohibitions to courts that exceed their jurisdiction, though this is not particular to the King's Bench, but common to all the four courts.

THIRDLY, it hath cognizance of all privileges and franchises, claimed by any private persons or corporations; and if any usurped upon the king in this respect, they are called in, by a *quo warranto*, to shew by what title they claim such privileges. Likewise where any member of a corporation is disfranchised, or removed from, or disturbed in his office, here shall he be remedied. For when a king has given a franchise, he is concerned, in honour and interest, to see that every man entitled, shall enjoy the benefit of it.

FOURTHLY, the king is interested in the life, limbs, and liberty of every subject. Therefore this is the court wherein appeals, brought by private persons, of murder, felony, and maim, should be tried; and if any man complains of wrongful imprisonment, this court shall, by writ of *habeas corpus*, have him brought into court, with the cause of his imprisonment returned; and if the cause is insufficient to discharge him, or if the offence he is charged with be bailable, to bail him. Nay, this court, in favour of liberty, hath a power, in all cases; they may, if they see proper, bail a man for crimes that are not ordinarily bailable by common law.

FIFTHLY, they have a right to hold plea of all the trespasses done *vi & armis*, though brought principally for a private reparation to the party; for this action favours of a criminal nature, and the king is entitled to a fine for the breach of the peace.

LASTLY, it has cognizance of all personal actions brought against persons that have the privilege of this court. The persons privileged are two, first

first the officers of the court, who are supposed to be constantly attendant thereon, and to whom it would be inconvenient, as well as to the court, to sue or be sued elsewhere; and therefore the privilege extends to suits brought as well by, as against such officers; secondly, the prisoners who are in the custody of the marshal of the court, and who are consequently not at liberty to appear in any other. These therefore can only be sued here; for the court will, in such case, order the prisoner up from their own prison to make his defence; and, under the colour of this rule, they now, by a fiction, make all sorts of actions suable in this court; for it is only alledging the defendant is in the custody of the marshal, though in fact he is not, and that is held sufficient to found the jurisdiction †.

I SHALL next proceed to the jurisdiction of the high court of Chancery, the second in antient times, but for some ages past the first court of the realm.

† 4. Institute, p. 70. et seq.

LECTURE

LECTURE XXXIII.

The jurisdiction of the high court of chancery—The Chancellor, a very considerable officer in the Curia Regis—The repeal of letters patent, improvidently issued to the detriment of the King or the subject, a branch of the jurisdiction of the court of chancery—The chancery, assistant to the exchequer in matters of the King's revenue—Other branches of the business of this court.

IN my last lecture, having taken notice, that, in the reign of Henry the Second, the *curia regis* and the *Exchequer*, which dealt with the king's revenue, were distinct courts, and that there were even traces of the *Common Pleas*, as another court, different from the higher court, the *curia regis*; I took occasion to treat of these several courts, and the several limits of their jurisdictions; although the now general opinion be, that these courts were not separated till after the barons wars, that is, not until an hundred years later; which opinion, as I conceive, hath, thus far, its foundation in truth, that the precise limits of their several jurisdictions were not perfectly ascertained, and kept distinct till then, though the division had been made before, that is, about the time I am now treating of. For, if it be a good maxim, as my Lord Coke says, *boni judicis est officium ampliare jurisdictionem*, it is not to be wondered at, that, for some time after the separation, the *Justiciarius Angliæ*, who had the sole jurisdiction in him before, should retain, in many instances, the exertion of it, where, after the separation, the matter properly belonged to another court.

THE maxim, indeed, is, in my opinion, utterly false. For where there are separate courts with distinct powers, surely it is the duty of each court, were it only to prevent confusion, to keep within their proper limits. However thus much must be allowed in justification of Lord Coke's maxim, that, as it is too much the inclination of human nature, when in power, to grasp at more than is properly our due, so the judges of all courts, and of all nations, have been as little exempt from this infirmity as any other set
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of men. Witness the outrageous usurpation upon the temporal jurisdiction in antient days, both by the ecclesiastical judges in the times of the Pope's grandeur, and by the judges of the constables and admirals courts, when supported by arbitrary kings†.

THE temporal judges, on the other hand, with a firmness highly to be commended, have successfully not only resisted these encroachments, but, by way of reprisals, have, in these latter days, made considerable inroads into the antiently allowed territories of those courts; not to the detriment of the subject, I must confess; for the method of trial by the common law, is certainly preferable to theirs. But the common law courts have not satisfied themselves with extending their jurisdiction, in derogation of those courts, which they justly looked on, in those days, as enemies to them, and to the laws and constitution of the kingdom, but they have made invasions into each others territories, and, by what they call *fictions of law*, have made almost all causes, except criminal ones, cognizable in any court; contrary to the very intention of dividing the courts; which was, that each should have their separate business, and that the judges and practitioners, by being confined in a narrower track, should be more expert in their different provinces‡.

IN treating of these courts, I began with the *King's Bench*, which, as long as the office of *Justiciarius Angliæ* subsisted, was the superior; but since Edward the First discontinued that office, on account of its too great power, and the business of that officer hath been shared between several judges, the rank of this court hath declined, and the *Chancery* hath obtained the first place. To this court, then, I shall now proceed. And as in it there are, at present, and have been for some ages, two distinct courts, one *ordinary*, proceeding by common law, and the other *extraordinary*, according to the maxims of equity, where common law could give no relief; I shall, for the present, confine myself to the former, and defer treating of the latter, until I come to that period when the *Equity jurisdiction* arose.

IN the antient times, before the division of the courts, the chancellor was a very considerable officer of the *curia regis*. It was his business to write

† d'Anver's abrigement, vol. 2.

‡ 4. Institute, p. 79.

write and seal with the great *seal* the *diplomata*, or *chartæ regis*, what we now call *letters patents*; to issue all writs, either for founding the jurisdiction of the *curia regis*, and the bringing causes into that court, that by the antient law belonged to the courts in the country; or those to the nobles, to summon them to attend the *commune concilium*, or parliament. Afterwards, when the House of Commons was formed, he issued writs to the proper places, for the election of the members thereof. Hence, when the courts were divided, the making out letters patents, the keeping the enrolments thereof, and issuing of *original writs*, as they are called, that is, those that found the jurisdiction of courts, and other writs of like nature, continued to belong to him; and, as these records remained with him, there arose to him a jurisdiction concerning them; except as to such writs as were intended to found the jurisdiction of another court, which, though issued from Chancery, were returnable into the proper court, and the cause determined there †.

THE first branch of the jurisdiction of this court, then, was the repeal of letters patents, that had issued improvidently, to the detriment of either of the king or the subject; and this properly fell to the lot of the chancellor, as he made out the patents, and kept the enrolments of them. The method of repealing those was by a writ called *scire facias* notified to the party claiming under the patent, and calling him in to shew cause why it should not be revoked. This *scire facias* issued in three cases: the first, at the suit of a subject; where two patents were granted to two persons of the same thing, the first patentee brought a *scire facias* against the second, to repeal his grant; the other two were at the suit of the king, where the king was deceived, either by false suggestions of merit, or as to the value of the thing granted; or, in the second place, if the king had, by his patent, granted what by law he could not have granted. Here, if the case was clear in law, and there was no controverted matter of fact necessary to be settled, to ascertain the right, the chancellor was judge; and if his judgment was against the patent, it was his duty to *cancel* the enrolment thereof; from which part of his office he had his name. I say if the case was clear in law, and there was no controverted matter of fact; for, if this latter was the case, he could not try it, he being antiently but an officer of the *curia regis*, and not a

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judge;

† Dugdale, orig. jurid. ch. 16. 4. Inst. p. 80.

judge ; and therefore unqualified to summon a jury. The rule continued the same after the separation of the courts, and his becoming a judge ; principally, as I conceive, for the preservation of the common law, and the birth-right of Englishmen, the trial by jury. For, as the chancellor was almost always, in those days, an ecclesiastic, and consequently supposed more attached to the *civil* and *canon law*, there might be danger, if he was suffered to try matter of fact himself, he might introduce a new method of trial. When, therefore, the cause was heard upon a *dēmurrer*, that is, the facts admitted of both sides, and only the law in dispute, he gave judgment ; but if they came to issue on a fact, he must carry the record over to the King's Bench, who summoned the jury, and gave judgment on the verdict †.

ANOTHER branch of his jurisdiction was with relation to the inquisitions of office. There are many officers whose duty it is to take care of the profits and revenues of the king, and to that purpose they are sworn in the Exchequer ; such as *escheators*, *sheriffs*, and others, whose duty it is to make enquiry what the king is entitled to in their respective limits, whether lands or chattels, or by what title. For this purpose they are to summon juries, and to return the verdicts found to the court of the revenue of the Exchequer, in order that that court may take care of the king's rights. These were called *inquisitions*, or *enquiries, of office*, as proceeding from the duty of an officer that made them. But these officers being negligent in the performance of this their duty, it became sometimes necessary, and afterwards customary to quicken them, by issuing writs for this purpose ; and these writs issued out of Chancery, the *Officina Brevium* ; and then, that it might be seen they were properly obeyed, the return of the inquisition was made into the court that issued the writ, and thus, the Chancery gained a jurisdiction in this point, and became an assistant to the Exchequer in the matters of the king's revenue ; not indeed in the administration thereof, but in bringing it into the king's possession ‡.

It is a maxim in the English law, that nothing can pass from the king to a subject but by *matter of record*, which maxim was not only advantageous to

† 4. Inst. p. 79. 80. 84. 88..

‡ Ibid. p. 225. 113. 80. 76..

to the royal estate, as preventive of persons getting grants by surprise, but also advantageous to the subject in the firmness of his title, when once he had obtained it. And, on the contrary, the regular and equal way of restoring possessions to the crown was by record also, that is, by inquisitions finding the king's title returned, as I have mentioned. But as the verdicts taken in these inquisitions may be erroneous, and detrimental to another person, by finding what was really his property, to have been the property of another, and to have accrued to the king by forfeiture or escheat; and as, regularly, by another maxim of law, there is no averring against or contesting a record, it was necessary that the bare return of inquisition into Chancery should not be final and conclusive, but that time should be given to any that thought himself affected to claim his right. Hence a month's time is given by statute, after the return of the inquisition, in which any person may come in and *traverse the office*, that is, contest the validity of it. And here the chancellor is judge, in the same manner as in the repeal of letters patents, that is, if the subject of the controversy depends merely upon matter of law; but if the parties come to an issue on matter of fact, he cannot try it, for the reason above given, but it must go to the King's Bench †.

ANOTHER branch of the judicial business is the hearing of petitions to the king for justice in his own causes. No man, by the feudal principles of our law, can bring an action against the king. For the charging him with wrong doing would be a breach of fealty. The king cannot, by our law, do wrong; but yet, from the multiplicity of his occupations, or from his being misinformed, the subject may sometimes suffer wrong from him. The remedy thereof, in this case, is by humble petition to the king, that he would enquire into the cause, and do justice to the party, which, though conceived in an humbler strain, is as effectual as an action, and must be tried in this court, the proper channel to convey his majesty's graces, and the king, by his chancellor, dispenses justice to the party.

ANOTHER branch of the judicial business of this court was the proceeding in certain cases against persons privileged, that is, the officers of the

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court,

† 4. Inst. p. 155. 79. 206.

court, who being supposed to be constantly attendant, were to be sued here, as the officers of other courts, were in their respective courts.

LASTLY, this court had jurisdiction with respect to proceeding upon *recognizances*, or acknowledgments of obligations taken in this court, which being here recorded, and not to be removed, were properly here triable†.

THERE are some other causes, proper for the jurisdiction of Chancery, which would carry me too far at present. I shall, therefore, conclude here with mentioning one striking difference between this and the other courts, that they sit only in the times of the four terms, whereas it is open all the year. The confining the others to the terms arose from the religion of the times, and the inquisitions of canon law, which forbade courts to be held during the seasons of the three great festivals, and of harvest. In obedience to this law, I may say (for the papal power was then very high in England) was our Michaelmas vacation set apart for the solemnization of Christmas, the Hillary vacation for Easter, the Easter vacation for Whitsuntide, and the Trinity or long vacation, for the uses of husbandry. But great would be the evils, if that court which is the *Officina Justitiæ*, the Shop of Justice, were to be ever shut. Writs, therefore, issued hence at all times, and all such causes as, for the public good, cannot brook delay till the ordinary times of sitting of other courts, are here handled in the vacations, such as to mention a few, *habeas corpus's* and *homine replegiando's*, to restore persons imprisoned to liberty, prohibitions to keep inferior courts within their proper limits; and *replevins*, to restore the possession of goods distrained.

BUT the great business of this court, as a court of common law, was, that it was the *Officina Brevium*, the shop where original writs were purchased by suitors, in order to commence their actions. An *original writ*, in the most common form, is an order to the sheriff to summon the party complained of to do justice to, or else to answer to the complainant in the proper court; containing a short description of the complainant's title, and the wrong done to him, from whence, in Latin, it is called *Breve*, and answers to the original citation in the Roman and ecclesiastical laws. This, and the making out patents, was the principal business of the chancellor in the *curia regis*, and

† 4 Inst. ch. 8. Bacon, hist. and polit. discourse, part. 2. ch. 18.

and therefore naturally continued with him after the division of the courts. The reasons assigned by Gilbert for having one of these superior courts a public shop for justice, are three; first, that it might appear that all power of judicature flowed from the crown; secondly, that the crown might not be defrauded of the fines due to it for suffering persons to desert the inferior courts, and to sue for justice immediately from the king; and lastly, to preserve an uniformity in the law; for these writs being made out in one constant form contributed greatly thereto, being both a direction to the judge, and a limitation of his authority.

ORIGINALLY, the chancellor heard the complaints of the person injured, and formed a writ according to the nature of the case, but as, among a rude military people, little versed in commerce, and the variety of transactions that attend it, the complaints of the people were confined in a narrow compass, it but seldom happened, after some time, that there was occasion for making a new writ, in a form different from what had been used before. These forms, therefore, were collected into a book of our law, called the *Régister*, the antientest book of our law; and the making them out, being now matter of course, nothing more than copying out the old terms, inserting the proper names of persons, and places, and the chancellor's business encreasing, became devolved upon the chancellor's clerks, the *Clerici*, as they were antiently, or the *Masters*, as they are now called, of Chancery; and they were restrained from making out any of a different form from those in the Register. However, as, in process of time, cases would happen which none of the forms in that book would suit, and it was looked on as the corner-stone of the law, the chancellor could not of himself venture to make out new and unusual writs, but referred the complainants, in such cases, to petition the parliament for remedy †.

THESE petitions afterwards growing too frequent, and interrupting the public business, it was found necessary to enlarge the power of the Masters of Chancery, and to give them a qualified power of forming new writs. This was done by the statute of Westminster the second, cap.

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† Baron Gilbert's history of the Court of Common Pleas. Madox, hist. Excheq. ch. 2. sect. 9. 2 Institute, p. 53. 4 Institute, ch. 8.

24, in Edward the First's reign; it runs thus: *Quotiescunque de cætero evenierit me cancellaria, quod in uno casu reperitur breve, & in consimili casu cadente sub eodem jure, & simili indigente remedio, non reperitur, concordent clerici de cancellaria in breve faciendo, vel atterminent querentes in proximum parliamentum, & scribantur casus, in quibus concordare non possunt, & referant eos ad proximum parliamentum, & de consensu jurisperitorum fiat breve ne contingat de cætero, quod curia domini regis deficiat conquerentibus in justitia perquirenda*; which last words, *ne contingat, &c.* gave a handle, as I shall shew hereafter, to this court to erect their equitable jurisdiction †.

WE see how this power given to the Masters was limited: it must be exercised only in cases parallel to such as there was a remedy already provided for; all the Masters must agree in the form of the new writ; and the remedy must be the same as was in the similar case in the Register. To illustrate this by the example of the first writ formed by the Masters upon this statute, and which therefore, by way of eminence, is called a *writ, in consimili casu*. The statute of Gloucester ordered the Chancery to form a writ for the relief of the person in reversion, where a tenant in power had aliened her dower. The writ was accordingly framed, and inserted in the Register. Now, by virtue of this statute of Westminster, the Masters framed the writ *in casu consimili*, in favour of the person in reversion, where a tenant by the courtesy, or tenant for life, had aliened, he being equally damaged as the former case. But though this was particularly called a *writ, in casu consimili*, there were many others formed by virtue of this statute, such as for various kinds of trespasses unknown in former ages, and actions upon the case, so frequent in these our days, and so called, because the writ is formed according to the circumstances of the case, and not upon the old forms continued in the Register.

THIS new employment of Masters in Chancery, and the business of the court encreasing, created a necessity of erecting new officers, to make out the *brevia de cursu*, namely, those in the Register, who were therefore

† 2 Institute, p. 405.

therefore called *Curritors*. The chief of the Masters is *Keeper of the Rolls* of this court, which was formerly a part of the chancellor's business; and he is therefore called *Master of the Rolls*. For ages past, since the Equity business multiplied in England, this officer has been there, in matters of equity, an assistant judge to the chancellor, but his decrees are liable to a rehearing, and to be reversed by the chancellor. But in this kingdom, the office hath not had any judicial authority annexed to it.

LECTURE

L E C T U R E XXXIV.

The court of Common Bench or Common Pleas—The jurisdiction of this court—Actions real, personal, or mixt—The court of Exchequer—The jurisdiction of this court—Exchequer chamber—The judicature of Parliament.

THE next of the superior courts, is the *Common Bench*, or *Common Pleas*, as it is more commonly called, being the proper court for the determining suits between subjects, wherein the king is not concerned; and upon the multiplication of business in the *curia regis*, it was separated from it, for the more speedy and easy dispatching the affairs of the people. As in the very old times the king often sat in person in the *curia regis*, and that he might have an opportunity of so doing when he pleased, that court always followed the king wherever he went within the kingdom of England; and in those days it was customary for the kings to take progresses; and reside in the different seasons of the year in different parts of the kingdom, as we see, by the variety of places where the parliaments were held in old times. The same practice of the courts and the records following the person of the king continued in France longer than in England. For when king John was taken by the black prince at the battle of Poitiers, the antient records of that kingdom were lost, and there are scarce any now remaining there, of what had passed previous to that time, except enrolments made since, of the antient charters that were in the hands of the subjects.

BUT in England the constant removal of the courts was found very burdensome to the people, who had suits much earlier. For their ease, therefore, it was enacted in *Magna Charta*, that *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*; that the Court of Common Pleas should no longer be ambulatory, but held in once certain place. Westminster was the place fixed upon, and there, if we except some occasional removals, on account of epidemical sicknesses, hath it been held ever since. And in long space of time after, the other courts became, though
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not in pursuance of any positive law, fixed there also. By their becoming settled in a certain place, one great inconvenience, besides the hardships on the suitors, was avoided, namely, the loss and imbezzlement of the records by these frequent removals. For it is very remarkable, that there is not a record remaining of the times previous to the fixing of the courts, not even the enrolments of the acts of parliament themselves, except a few, and a very few, of the courts of Exchequer, which, concerning the king's revenue, were more carefully preserved†.

BUT the greatest advantage that attended this change was the improvement of the law, and, what was a consequence thereof, the preservation of the liberty of the subject. For now it became much more convenient for persons to apply to that study, when they were no longer under a necessity of removing. And we therefore, soon after, find the practitioners of the law settled together, something in a collegiate manner; and after the dissolution of the order of Knights Templars, the habitation of these latter, called the *Temple*, was granted to them for their residence and improvement. Here, they continued to confer the degrees of *Apprentices*, or *Barristers at law*, and *Sergeants at law*, which they had began before, in imitation of the bachelors and doctors degrees in universities.

THE preservation of the liberty of the subject was, as I said before, another happy consequence that resulted from the fixing the courts, and the uniting the professors of the law into one body. For as, about this time the study of the civil and canon laws was eagerly pursued by the clergy in the universities, and the English customs as much depreciated by them as possible, and as those two laws were founded on maxims of despotism, and, as such, encouraged and supported to the utmost by the popes, and all kings that aimed at arbitrary power, the common lawyers were necessitated, for the support of their profession, to take the popular side of the question, and to stickle for the old Saxon freedom, and limited form of government.

HENCE the steady opposition they made, even in those early times, to the king's dispensing. Nay, they carried their zeal for liberty so far, as (since

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† 2. Institute, p. 21, 22.

they could not directly, in those days, oppose the weight of the civil law) to quote the very passages of it that were in favour of absolute power, and by their glosses make it speak the language of liberty. Thus Bracton quotes that text: *Quod principi placet, legis habet vigorem*; that is, in its true meaning, the monarch is sole legislator: but Bracton's comment is, *id est, non quicquid de voluntate regis temere prescriptum fuerit, sed quod concilio magistratuum suorum, rege auctoritatem præstante, habita super hoc deliberatione & tractatu, recte fuerit definitum*; that is, the king is not sole legislator; directly contrary to the sense of the very text he quotes. And it must be allowed, to the honour of the common lawyers, that, with the exception of a few venal time-serving individuals, they have, for a succession of ages, proved themselves true friends to a rational civil liberty in the subject, and to reasonable power and prerogative in the king†.

To come to the jurisdiction of this court. Its proper business, as appears from its name, is to take cognizance of all *common pleas*, that is, all pleas that are not pleas of the crown, or at the suit of the king. With these it cannot meddle; for all actions at the suit of the king for criminal matters, belong to the King's Bench, as those for his revenue do properly to the Exchequer. But it hath jurisdiction, and that universally, throughout England, in all civil causes, whether *real*, *personal*, or *mixt*; the distinction of which it will not be amiss just to point out.

REAL actions are those that are brought to recover land itself, where the claimant has a right to an estate in it for life at least; and these, until within these two hundred and fifty years, were the only ones used for that purpose; but, since that time, they are gone almost entirely out of use, on account of their nicety, their delays, their being conclusive; and their place is supplied by mixed actions, which are easier, shorter, and may be tried again. However, if any one was inclined, at this day, to bring such an action, this is the court to bring it in; and therefore all *common recoveries*, which antiently were, and still carry the form of, real actions, are suffered in this court.

PERSONAL.

† Bracton, lib. 1. cap. 1. Fortescue de laud. leg. Angliæ, cap. 34.

PERSONAL *actions* are those that are brought for the recovery either of some duty, or demand in particular, or of damages for the non-performance of some promise or contract, entered into, or lastly such as are brought by a man to recover a compensation in damages for some injury sustained in his person—or property. To give but one or two instances of these last: If my ground is trespassed on, if my person is assaulted, my reputation injured, the remedy is by the personal actions of *trespass*, *assault & battery*, or *slander*. All actions for breach of covenants are likewise personal actions; for, by the common law, damages only are recoverable thereon, and the party is not obliged to perform the covenant. Wherefore, if a man chuses rather to have his covenant performed than receive a satisfaction in damages, he must go into a Court of Equity, which will oblige a man to perform in specie, what he hath specifically engaged to perform, if the performance is possible. This court, therefore, being the proper court for personal actions, fines of lands are levied here; for they are fictitious actions, founded on a fictitious breach of covenant.

MIXED actions are designed for the recovery of a specific thing, and also damages, and consequently partake of the nature both of real and personal actions. For instance: If a tenant for life, or years, or at will, commits waste, he forfeits to the owner of the inheritance the place wherein the waste was done, and treble damages. The *action of waste*, therefore, being brought to recover both, is a mixed action. The action of *ejectment* also, which was originally proper to recover damages for being put out of a lease for years, but is now the common remedy, substituted in the lieu of real actions, is now of the same nature; because both the land itself, and damages for the wrong are recovered †.

THESE three kinds of actions are properly the business of this court, though, as to the two last, actions personal and mixed, the courts of King's Bench and Exchequer have, by fictions, gained a concurrent jurisdiction with this court; the King's Bench, by supposing the defendant to be in the custody of the marshal thereof; and the Exchequer, by supposing the plaintiff to be a debtor to the king.

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† Baron Gilbert, Hist. of the court of Com. Pleas. 4. Inst. ch. 10.

THE proper way of founding the jurisdiction of this writ, is by a writ out of Chancery, returnable hither, either to begin a cause originally here, or to remove one depending in an inferior court not of record ; but, in some cases, they proceed without any writ from Chancery, as in causes brought by or against an officer of the court, and likewise, in granting prohibitions to other courts that attempt to enlarge their jurisdictions.

BEFORE I conclude, I must observe, that this court, though one of the four high courts derived out of the *curia regis*, is not, however, supreme, but subordinate to the King's Bench. For judgments given therein are reversible in the King's Bench, by a writ of error issuing from the Chancery, suggesting the king's being informed that manifest error has intervened, and commanding the record to be transmitted into the King's Bench ; the judges belonging to which, upon the face of it, and nothing else, are to affirm or reverse the judgment ; for the error must be manifest ; and no error in point of fact, but error only in point of law, can be averred against a record.

THE lowest in rank of the four great courts, though from antient times one of the greatest importance, is the court of *Exchequer*, whose business was to collect in the several debts, fines, amerciaments, or other duties or properties belonging or accruing to the king, and likewise, to issue money by his orders ; and this court being originally solely erected for the king's profit, is the reason, I presume, why it is held in rank the lowest ; it being more honourable to the crown to give precedence of rank to those courts that were intended for the administration of justice to the subject, above that which was intended merely for the king's temporal advantage. Besides, this court was, in its original, distinct from the *curia regis*, the treasurer being the judge in this, as the *justiciarius Angliæ* was in the other ; and therefore, it was regular, that the Chancery, and Common Pleas, as having been once part of the supreme court, should take place before this. Its having been originally a distinct court, accounts for its independency on the King's Bench ; for, no writ of error lies from it to the King's Bench, as doth from the Common Pleas, but its errors are rectified in another manner*.

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* 2d. Inst. p. 196. 197. 255. 551.

THIS court, as well as the Chancery, hath, properly speaking, two courts: one, ordinary, proceeding according to the strict rules of the common law; the other, by equity; for, as it is the king's duty to render justice with mercy, so, in this court, the rights of the king are not always exacted with rigour; but, on circumstances of reason and equity, may be mitigated or discharged. The court of common law in this court had antiently much more business than of late. Originally, whilst the royal demesnes were unalienated, they had the setting of them for years; but, afterwards, people chusing rather the authority of the great seal, took them in Chancery. That court, as I mentioned when treating of it, had likewise gained the returns of inquisitions of office, and had also gained by act of parliament, the composition of forfeitures, for the king's tenants *in capite* aliening their lands without license; which, otherwise, would have belonged to this court. The erection of the *Court of Wards*, also, by Henry the Eighth, took off that branch of its jurisdiction; and the abolishing of the military tenures by Charles the Second took away the business of calling in their fruits. The erecting the office of *the Treasury*, as distinct, for the issuing of money, had the same effect; but, above all, the erecting new jurisdictions, and appointing new judges to try causes relative to the new taxes, as the Commissioners of the Customs and Excise, and Commissioners of Appeal, diminished the peculiar business of the court †.

It will be now proper to consider the nature and extent of their present jurisdiction. Here then are sworn the sheriffs, and other officers concerned in the king's revenue and duties; and here they are to return, and make up their accounts. Here, likewise, the king sues his debtors, or even the debtor of his debtor (for so far his prerogative extends); and here also, for enabling his debtors to pay him, they are privileged to sue their debtors; an allowance that hath grown up by degrees to extend the jurisdiction of this court, and to make it concurrent with the Common Pleas. For it is only alledging, (and this they will not allow to be traversed or denied) that the plaintiff is the king's debtor, and the business is done. The court acquires an immediate jurisdiction. The same allegation is likewise necessary, when a suit of equity is commenced in this court; for otherwise, the suit would, on the face of it, appear to belong to Chancery. I need scarce observe, that the
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† 4th Inst. ch. xi.

officers of this court are to sue and be sued here; for that is a privilege common to the officers of all the courts, arising from their personal attendance. Here, likewise, the king's attorney-general exhibits informations for concealment of customs and seizures, informations upon penal statutes, where there is a fine due to the king, forfeitures and breach of covenant to the king; likewise all informations for intrusions, wastes, spoils or encroachments on the king's lands; in general, where the crown suffers in its profits.

IN this court of common law, the *Barons of Exchequer* only are judges, and are called *Barons*, because antiently none were judges there under that degree. In the Court of Equity, the chancellor of the Exchequer is joined with them, though it must be owned this officer hath seldom, of late years, acted either in England or Ireland, in his judicial capacity, and it hath been considered little more than as a great lucrative place. Errors in this court are not, as I observed before, redressed in the King's Bench, as those of the Common Pleas are, but in another court, called the Exchequer Chamber, consisting of the lord chancellor, lord treasurer, and chief judges.

THERE is another court of *Exchequer Chamber* in England, tho' we have none such in this kingdom, erected 27th Eliz. and composed of the judges of the Common Pleas and barons of the Exchequer, in which lies a writ of error from the King's Bench, to reverse judgments in certain suits commenced there originally. Into this court are frequently removed, or adjourned from any of the other courts, causes that are of a new impression, and attended with difficulty, or even such concerning which the judges, perhaps, entertain no great doubts, but are new, and attended with extensive consequences; and this, for the more solemn determination, that all the judges of all the courts might be consulted about establishing a new precedent. Antiently such causes were adjourned into parliament, but the legislative business of that high court increasing, this court was substituted for the above purpose of consultation †.

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† 4th Inst. ch. 13.

To finish this account concerning the superior courts at once, it will be proper to say something of the supreme judicature of all, that of parliament. Antiently, as I have frequently observed, all causes but such as concerned the king or peers, or those that were of great difficulty, or such as justice could not be expected in by law, were dispatched in the county courts, the rest by petition to the king in parliament, or, in the intervals thereof, in the *curia regis*, which originally was but a committee thereof, appointed by the king. Hence matters determined there, were subject to a review in parliament; writs of error from the King's Bench returned there; and when the Equity courts grew up, appeals from the Chancery and Exchequer in matters of equity. This power of judicature is peculiar to the lords (for the parliament consisted at first only of them, and when the commons were introduced, they sat in a distinct house) and the parliament hears at present only matters that come from other courts by appeal, or by writ of error, which is in the nature of an appeal, and no causes originally. It is true, that, for a long time after the division of the courts, many causes by petition were brought into parliament in the first instance; but these being generally referred to the courts below, the practice ceased, and would not now be allowed. For a long time accusations against peers were originally admitted, but at present, and for this long time, indictments found below are required before a peer can be tried; nor can the trial of peers by impeachment in parliament be considered as an original trial, for the commons are considered as the grand inquest or grand jury of the whole nation, and therefore an impeachment by them is not only equivalent to, but has and ought to have greater weight than any indictment by any private grand jury.

IN this judicature of the lords, an impeachment there, is one singularity, an exception to the grand rule, that every man is to be tried by his peers, and that is, that a commoner impeached by the commons shall be tried by the lords. The reason of this procedure seems to be, that all the commons of England are supposed parties to the accusation, when their representatives have accused him, and it might be dangerous to trust his life with a common jury; but the lords are strangers to the charge, and it is their interest to controul the commons, if they proceed with too great violence*.

* Hales of the power and jurisdiction of Parliament. Selden of the Judicature of Parliament. See his works vol. 3. 4. Inst. ch. 1.

LECTURE XXXV.

Henry II.'s dispute with Becket—The constitutions of Clarendon—The murder of Becket.

HAVING, in a general manner, run through the jurisdictions of the several great courts of the kingdom, which were divided from each other about the time I am now treating of, though the division was not compleated, nor the several limits exactly adjusted till some time after; I shall proceed, in a summary way, with the few remaining observations I have to make, with respect to the state of the law during the reign of Henry the Second. And the greatest and most remarkable of these was his dispute with Becket, archbishop of Canterbury; a contest attended with the most fatal effects, and which makes up a considerable part of the civil history of that reign. The particular circumstances that attended it, and the many turns it took, I shall not dwell on; but, as it arose from the clashing of contrary laws, I shall briefly lay open its source, and give an account of the events.

FROM the year of Christ one thousand, the popes had every day been encreasing their power, and extending their pretensions. They set themselves up, at first, as protectors of the clergy, who really had been oppressed by the temporal princes, and in order to attach them more firmly to their interests, they made canons in councils, and published decretal epistles, by their own sole authority; which, in those days of superstition, were too readily received as laws; all tending to depress the civil power, to raise the ecclesiastical on its ruins, and, in short, to pave the way for making the pope supreme monarch of the world, in matters temporal as well as spiritual. The emperors, however, stickled hard, on the other hand, to support their rights, and particularly to maintain to themselves the nomination of the popes, as well as of other bishops, which the popes had transferred to

to the people of Rome first, and afterwards to the clergy alone; so that, for a good part of this time, there was a schism in the church, and two popes in being, the one named by the emperor, and the other elected; and I observed before, William Rufus kept himself independent by acknowledging neither, and was absolute master of the church. However, the popes that were elected, generally gained ground. They had the majority of the clergy on their side, and indeed most of the sovereign princes of Europe, who were jealous lest the emperor, under pretence of being successor to the Romans, might arrogate a superiority over them.

It is surprizing, yet very true, that, in these contested times, the papal power was pushed very near its greatest height. The materials, indeed, were formed and collected some time before. A multitude of fictitious decretal epistles had been forged in the names of the antient popes, so early as from the year 800, all tending to exalt the bishop of Rome, as head over the church universal; but these were not as yet generally known and received as laws, the church being hitherto governed by collections of canons made by private persons, out of the canons of the general or provincial councils and sayings of the fathers. But in the reign of our Stephen, the mighty fabrick began to be reared, and to take a regular form. Gratian, a Roman courtier, undertook to make a new compilation of ecclesiastical laws, and published it under the name of *Decretum*, which is now the first volume of the canon law. This is a motely composition, digested under distinct heads or titles, of rules and decisions, collected from the sayings of the fathers, canons of the councils, and, above all, from the decretal epistles of the popes, (the modern ones real, the ancient ones forged), and was put together principally for the two great purposes, of aggrandising the See of Rome, and exempting the clergy from lay-jurisdiction. And, for that purpose, not only forged epistles and canons have been inserted in it, but the real canons and writings of the fathers have been, in many places, falsified by adding or omitting words as best served the purpose proposed; and that this is the case of Gratian's work, the learned Papists themselves confess, in many instances. However, in that ignorant age, it passed easily all for genuine. But the popes, wisely considering, that, if it was canvassed, it would not bear a strict scrutiny, never chose to give it an authentic testi-

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mony of their authority, but contented themselves with authorising it to be read in universities. In the interval I have mentioned, the popes began to turn their spiritual arms of excommunication or interdict, that is, forbidding the administration of divine offices, except in *articulo mortis*, in a country or district, to temporal purposes, and the support of their grandeur †.

ON this state of affairs happened the quarrel between the archbishop and Henry, which embroiled him with the pope, embittered his life, and was attended with consequences that brought him to the grave with sorrow. At this time there were two popes, Victor, confirmed by the emperor, and Alexander, the most enterprising pope the world had yet seen, supported by the king of France. Had Henry followed the example of William, and acknowledged neither, he might have kept both in awe, and vindicated the rights of his crown with success. But he was prevailed upon by Lewis of France to recognize Alexander, who was afterwards made an instrument of humbling Henry, of whose power that monarch was jealous. For his extreme partiality and severity is, in part, to be ascribed to the influence of his protector, as well as to his zeal for ecclesiastical immunities. These immunities had grown to an excessive height, and, under the pretence that no man should be twice punished for one offence, the bishops took care to inflict penance on ecclesiastical offenders, and then refused to suffer them to be tried by the laws of the land; so that the most profligate ruffians crowded into the lower order, and committed with impunity (except penance, or rather, a pecuniary commutation for it) what murders, rapes, and robberies, they thought fit. Henry was sensible of those enormities, and, in hopes of curing them, by the assistance of one highly obliged to him, got Becket, who was lord chancellor, his favourite, and indebted to him for his grandeur, promoted to the See of Canterbury. But he soon found how much he was mistaken in his man. Becket had been bred in his youth in the study of the ecclesiastical laws, and, though he had in all things hitherto complied with the king for his advancement, was, at the bottom, strictly attached to his order and its privileges, and resolved, at whatever price, rather to extend than diminish them.

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† Giannone's hist. of Naples, b. 1. Bower's hist. of the Popes, vol. 1.

To dazzle the people, he threw aside the pomp and expensive life of a courtier, and assumed the character of mortification and sanctity. He began by reclaiming the estates belonging formerly to his see, though they had been aliened by his predecessors, with the consent of their chapters, and upon valuable consideration ; and this under pretence of a canon, made a year or two before by Pope Alexander, in a packed council at Troyes in France ; which was plainly saying, that an ecclesiastical canon might repeal the laws of any country, and subvert its constitution. He made an attempt likewise on the patronages of laymen, and appointed a parson to a church, which belonged to one of his own tenants, and afterwards excommunicated the tenant for turning this person out, altho' he was the king's tenant *in capite* ; and such, by a law of the conqueror, were forbid to be excommunicated without the king's leave, under the penalties of treason. This was a very necessary law ; as otherwise a bishop might, by his sentence, deprive the king of his service, and that of as many of his military tenants as he pleased. However, in this point, when he found he was in danger of being prosecuted on the law, he relented, and absolved the gentleman †.

His screening of criminals was exercised also in the most shameful manner. A lewd clerk had debauched a young lady, and afterwards publicly murdered her father, and this criminal was refused to be given up to be tried. Another was guilty of sacrilege, in stealing a silver chalice out of a church, and *Becket* would not suffer him to be tried by the laws of the land. However, as the offence concerned the church, and was therefore of a very heinous nature, he tried him himself ; and having found him guilty, branded him with a hot iron, in defiance both of the English and canon laws, neither of which allow such punishments to an ecclesiastical judge. But he knew he was too faithful a servant to the Pope, to be called to an account even for making free with his own law.

HENRY, finding it necessary to stop the prelate's career, summoned an assembly of the bishops, and demanded of them that they should degrade all ecclesiastical murderers, and deliver them over to the secular arm. At first the majority seemed to think this a reasonable proposal ; as they must, in the first place, find them guilty before they were to be given up. But *Becket*

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† Lord Lyttelton's hist. of Henry II. b. 3.

brought them over, by representing, that, by the canon law, they were not to be concerned in matters of blood, and that their delivering over any criminal to capital punishment would be infringing thereof. They therefore refused the king. He then demanded whether they would observe the laws and customs of the kingdom. Their answer was, in all things that did not interfere with the rights of their order. The king left the assembly in wrath, and at length, Becket was, by the intreaties of the other bishops, and even of the Pope's legate, who knew his master, being embroiled with the antipope, was not able, at this time, to support him, prevailed with to wait on the king, and promise to observe the laws of the land without any reservation †.

HENRY, sensible that such a general promise, when particular facts arose, might be explained and evaded, was resolved that the limits of the ecclesiastical jurisdiction should be ascertained in such a manner as would leave no room for subterfuges; and to that end called a parliament at Clarendon, wherein Becket and the bishops swore to observe the laws there made, called *constitutions*, as new laws, but declared to be the old laws of the realm. These constitutions were in number sixteen. I shall mention a few of the principal, in order to give a notion of the points of jurisdiction then contested between the spiritual and lay courts. First, then, it was declared, that suits about presentations to livings belong to the king's courts; that clergymen should be tried for temporal crimes in the temporal courts; and that, if they pleaded guilty, or were convicted, they should lose the ecclesiastical privilege; that no clergyman should quit the realm without the king's licence, nor attain it, without giving security to attempt nothing to the prejudice of the king or kingdom; that no immediate tenant, or officer of the crown, should be excommunicated without the king's licence; that appeals in ecclesiastical causes should be made from the arch-deacon to the bishop; from the bishop to the archbishop, from the archbishop to the king.

THIS indeed was striking at the root of the Pope's supremacy, and of his profits too. It was in truth declaring the king supreme head of the church as to jurisdiction; next, that all that held ecclesiastical dignities by the

† Daniel, ap. Kennet. Carte.

the tenure of baronies, should do the duty of barons, and among the rest sit in judgment as barons; however with this favourable allowance to them, in consideration of their being bound by the canon law, that they might retire when the question was to be put about loss of life or limb; likewise that no bishop, or abbot, should be elected without the king's consent; nor, when elected, be consecrated till they had first done homage and fealty; that the spiritual courts should not hold plea of debts due upon oath; and lastly, that the spiritual and temporal courts should mutually aid each other in carrying their sentences into execution†.

SUCH were the most material of the famous constitutions of Clarendon drawn from the antient practice, and law of the kingdom, which the Pope afterwards declared null and void, as contrary to the rights of the holy church; which was plainly assuming the supreme legislature in every thing that had the most distant relation to a church, or a churchman. But Becket, who had sworn to obey the old laws only, for fear of personal danger at that time, did not wait for the Pope's condemnation of them, but instantly shewed he was resolved to disobey, by enjoining himself penance, and abstaining from officiating till he could obtain the Pope's absolution. Henry, provoked to the uttermost, was now resolved to crush him. He called him to an account in parliament for all the king's moneys that had passed through his hands while he was chancellor, and for one thousand marks he had lent him; demands that the king had never intended to have made, but for his refractoriness; and which he well knew he was not able to pay, having embezzled them in high living.

THE archbishop resolved to stand out to extremity: he offered a most wonderful plea in a cause merely civil, that of debt, *viz.* that his being made archbishop of Canterbury had discharged him of all former accounts and debts, and appealed, even in this purely civil cause, to the Pope. When reproached with contravening the constitutions of Clarendon, contrary to his oath, he broached another curious maxim, That, in every oath a clergyman could take, there was a *tacit salvo* for the rights of his order; he forbid the bishop to sit in judgment upon him, under pain of excommunication.

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† Hoveden. edit. Savil. 494—549. Mat. Paris. an. 1164. Lord Lyttelton's hist. of Henry II book 3. Brady's history.

He would not hear his sentence, but told the peers that he was their father, and they his children, and that children had no right to sit in judgment on their father. He then departed, in contempt of the court, and went over to France, where he was kindly received by that king ; and the Pope avowed and encouraged him in all the extravagances he had advanced, received his appeal, and annulled all sentences against him.

HOWEVER, as the schism was not yet ended, he kept him in for some time from proceeding to extremities ; but as soon as the danger was over, the Pope suffered him to thunder out his excommunications against all the ministers of the king, and all that observed the constitutions of Clarendon. The king himself, indeed, was spared, and the kingdom was not, on this occasion, laid under an interdict ; a circumstance then much apprehended. The king, on the other hand, enacted, that no appeals should be made to the archbishop, or Pope ; that the lands belonging to Becket should be confiscated ; that the clergy who resided abroad should return in three months, or forfeit their benefices ; and that no letter of interdict should be brought into England, the penalty of which last was afterwards made the same of treason.

THE king was not a little uneasy at the apprehensions of personal excommunication, or of an interdict's issuing, as he observed the censures already passed had but too much influence on the weakness of many of his subjects. He therefore, to ward the blow, had recourse to negotiation, which the Pope readily admitted, who feared, on the other hand, from the popularity of Henry's and the unpopularity of Becket's conduct, that his ecclesiastical thunders might be slighted in England. He contrived, however, in the interim, to embroil him with the king of France, and other powers on the continent. Matters continued on this footing for some years, in a train of negotiation ; in the course of which the moderation of the king and the influence of the archbishop were equally remarkable, till, at length, the former, finding the Pope had trod down all opposition, and that his own interest was on the decline, was obliged, I may say, to submit ; for he was reconciled to Becket ; engaged to restore his and his adherent's effects, and to suffer him to return to England, which he did with the additional quality
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of legate of the Pope ; and no mention was made of either side, of the subject of the dispute.

BUT Becket was resolved to shew the world he had conquered. He began the exercise of his legatine power, by suspending and degrading the clergy, and excommunicating the laity that adhered to the laws of the kingdom. Nay, he excommunicated two of the king's tenants for cutting off the tail of his sumpter mule ; so sacred was the beast become.

SOON after he was murdered at the high altar, in consequence of a rash speech of the king's, in a barbarous manner, as all, any way acquainted with the history of England, must know ; and now was Henry completely at the Pope's mercy. For Becket, dead, served the See of Rome more effectually than he ever could have done living. The bloodiness of the fact, the sacredness of the place where it was committed, and the resolution with which he died, filled not only all England, but all Europe, with religious horror. Miracles in abundance he immediately wrought, and he who by many was looked upon as a traitor, was now universally esteemed a saint and a martyr ; and so he was to the interest of the See of Rome.

IN these circumstances Henry was obliged to submit to be judged by the Pope's legates, who, at length, absolved him, on his swearing that he had not willingly occasioned the murder, and that he felt great grief and vexation on account of it ; in which, no doubt, he was sincere. But before he could obtain it, he was obliged to promise to be faithful to Alexander and his successors, not to interrupt the free course of appeals to Rome in ecclesiastical causes, and not to enforce the observance of evil customs introduced since his accession to the throne ; for so they stiled the constitutions of Clarendon, though they were only declarations of the old law. And thus ended this famous contest, in an absolute victory on the side of the Pope †.

† Hume, Carte, Lyttelton, &c..

LECTURE XXXVI.

The rebellions of Henry's sons—He is succeeded by Richard I.—The steps taken at this period towards settling the succession to the kingdom—The laws of Oleron—Accession of John—His cruelty and oppressions.

HENRY's quarrel with the Pope, terminating in the manner it did, necessarily weakened the weight and influence he ever before supported, both in his own kingdom, and on the continent; nor could the unwearied pains he afterwards took, in redressing grievances, and making salutary laws, by the advice of his parliament, restore him to the consequence he had lost. The rest of his life was spent in unfortunate wars with his rebellious children, instigated thereto by the artful Philip of France. And the pretence was grounded on a step that Henry had taken in favour of his children, and I may add of his people, that of bringing the crown to a regular course of succession, and by that means preventing contests upon a vacancy. Hugh Capet, the first of the present race of French kings, who came to the throne by election, in order to perpetuate it in his family, invented that practice which his successors followed for near three hundred years, of associating the eldest son, by causing him to be crowned in the father's lifetime.

HENRY, who loved his children, and was sensible that the not following this practice in England had occasioned the wars between William and Henry the Conqueror's sons, and their brother Robert, as well as those between Stephen and himself and his mother, crowned his eldest son Henry. But the use which the ungrateful prince made of his advancement, was to embroil his father, by demanding the immediate cession of Normandy, on pretence that, being a king, he should have some country given up immediately to govern. Upon young Henry's death, the father, who knew Richard, with greater capacity, was equally unnatural with his elder brother, resolved not to give him the same pretence to trouble him,
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and refused obstinately to have him crowned ; but this refusal served itself for a pretext for rebellion, as it gave Richard room to think, or at least to pretend to think, that his father intended to disinherit him, and to settle the crown on his youngest and favourite son John. In this rebellion Richard, assisted by the king of France, and many of Henry's subjects, who probably suspected Henry's design was such as was suggested, prevailed, and the father was obliged to engage that his subjects should take the oath of eventual allegiance to Richard, and soon after died of a broken heart, occasioned by the undutiful conduct of every one of his sons.

RICHARD accordingly succeeded ; during whose reign we have little to observe concerning the laws, the whole time of it being spent in a continual state of war either in Palestine or France. Enormously heavy indeed were the taxations his subjects laboured under, and yet they bore them with cheerfulness. For the holy war, and the recovery of the sepulchre of Christ from the infidels, no aids could be thought exorbitant ; and for his wars after his return he was readily supplied out of affection ; for the remorse he shewed for having occasioned his father's death, his admirable valour, the injustice of and the cruel treatment he received in his captivity, and, above all, the opposition between the perfidious conduct of the French king and his openness and sincerity, endeared him to his subjects, made them shut their eyes on his many failings, and bear their burthens with patience.

Two things only passed in this reign proper for the subject of these lectures, the steps made for settling the succession of the crown, and the laws of Oleron. As Richard was unmarried when he set out for Palestine, he thought it proper to prevent, if he could, any doubt that might arise, in case he died without issue. There might, in this case, be two competitors, Arthur, the son of Geoffry, his next brother who was dead, and John the youngest brother, who was living. However clear the point is at this day in favour of the nephew, it was then far otherwise. For Arthur might be urged the right of representation. He represented his father Geoffry ; in all the siefs in France, the law was in favour of the nephew ; nay, Glanville, who wrote in Henry the Second's reign in England, as to English estates, declared to the same purpose ; and certain it is that the general current of opinions at that time tended that way †.

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† Hale, hist. com. law, chap. 7.

ON the other side, it might be said in favour of John's pretensions, that the examples of fiefs could be no precedents in case of crowns. These required more strictly, a person capable of acting in person. That this was the very case; John was a man, Arthur a child; that, allowing Glanville to have laid down the law right, he had made a distinction, which comes up to this case; for he says, the uncle shall succeed, if the father of the nephew had in his life-time been *forisfamiliated*; that Geoffry had been out of the *patria potestas* of Henry, by being sovereign prince of Britany; that in the Saxon times two cases, for the exclusion of infants, had happened, much stronger than the present; that when Edmund the first died in possession of the throne, his brother Edred succeeded, not his sons; and though Edmund Ironside had been king, yet, after the Danish usurpation ceased, his brother the *Confessor* was preferred to his son, though of full age, whereas Geoffry never had the crown; that, since the conquest, three several times had the lineal succession been set aside by parliament. So that there were not wanting plausible arguments of each side of the question, and it is with injustice that modern historians, considering only the maxims of their own times, when a regular succession has been established, charge John with a manifest usurpation of the crown of England. But that he was a manifest usurper of the territories in France must be allowed; for, by the laws of that country, they should have gone to the nephew.

A QUESTION of this weight and difficulty should regularly have been decided in parliament, which always hitherto had determined in such matters; but Richard had never thought of the business till he left England, and then it was too late to proceed in that method. He was obliged, therefore, to content himself with declaring, by his own authority, his nephew Arthur his successor; and, to prevent John's traversing his design, he exacted an oath from him not to set foot in England for three years; but from this obligation he afterwards released him, at the request of their mother. John used all his art to caress the nobility, and to supplant his nephew Arthur, as he fondly hoped Richard would never return. And indeed, the conduct of William Longchamp, bishop of Ely, Richard's viceroy, contributed greatly to his success; for, as to oppressions and outrages, he was not exceeded even by William Rufus himself. This gave John a pretext for intermeddling

intermeddling to preserve the liberties of the people. He sent word to that prelate, that if he did not refrain from his exorbitancies, he would visit him at the head of an army; which for such an occasion he might easily raise.

A GENERAL assembly, or parliament, was called, to compose the differences; in which it was settled, that Longchamp should continue in the administration, and hold the castles during the king's life, but that, if he died without issue, they should be delivered to John as successor; and this agreement was ratified by the oaths of all the nobility and prelates, so that, as Arthur had the decision of the king in his favour, John by this means attained that of the people. Sensible how much this step must offend the king, and of the dangerous predicaments he must stand in should he return, he spared no pains to ascend the throne even in the life of his brother, in which he was cordially supported by the king of France. But all his efforts were baffled by the vigilance of the regency, who had been appointed on Longchamp's deposition, and was more necessary from his continuing in his former extravagancies. John even gave out that Richard was dead, and seized several castles, which he put in a state of defence. He was, however, soon reduced, upon the king's return, and all his treasonable practices pardoned at the intercession of his mother. When Richard came to die, he changed his mind as to Arthur, and by will appointed John his successor: an alteration, considering his former attachments to his nephew, who had never offended him, that could proceed from nothing but his unwillingness to leave his dominions involved in a civil war through the intrigues and interest of his brother.

THE laws of Oleron concerning naval affairs are the only specimen of this prince's legislative capacity. They were made at the isle of Oleron, off the coast of France, where his fleet rendezvoused in their passage to the Holy Land, and were designed for the keeping of order, and the determination of controversies abroad. With such wisdom were these laws framed, that they have been adopted by other nations as well as England. And, I think, to this time we may, with probability enough, refer the origin of the admiralty jurisdiction. In his reign, for the first and the last time, was raised the feudal aid, for the redemption of the king from captivity.

NOTWITHSTANDING all the faults of this prince, his firmness against the papal power is to be commended. Two of his bishops having a controversy, there was an appeal to the pope, who sent a legate to determine it; but Richard prevailed on the parties to refer it to his arbitration, and would not suffer the legate to enter England, till he had made an end of the business; and when he did come, the king suffered him not to exercise his legatine power in any but one single point, and that by his express permission. Notwithstanding all the steps taken in favour of John, in order to pave the way for his succession, the notion of Arthur's hereditary right had taken such strong root in the minds of many, that, had he been in England, and of a sufficient age to manage his affairs, he might have had a fair prospect of success †.

THE lower people indeed were easily prevailed on by his agents to take the oath of fealty to John, while the prelates, and nobility in general, retired to their castles, as deliberating what steps they should take; but, at length, by magnificent grants, and more magnificent promises, they were prevailed on to come in, and he mounted the throne without opposition. But in the French provinces his usurpation met with more resistance. Arthur had many partizans, and his cause was espoused by Philip of France, the lord paramount, not with an intention to strip John of all; for that, with Britany, would have made Arthur too powerful; but with a design to divide the dominions more equally between them, and perhaps to clip off a part for himself, as he afterwards did Normandy, as being forfeited by a sentence of the peers of France, by John's murder of Arthur. By the way, I shall observe, that this sentence was notoriously unjust. By the laws of France, Arthur was the undoubted heir of Normandy, and on his death his sister ought to have succeeded, nor ought the duchy to have been forfeited by the crime of a wrongful possessor. Or, taking it the other way, that Philip had a right to choose his vassal, and, consequently, that the investiture he gave to John was valid; then was he rightful duke of Normandy, and Arthur, as duke of Britany, was his vassal, and had justly forfeited his life, by rebelling and endeavouring to depose his liege lord. That John was guilty of this crime there was no room to doubt; and truly, from the whole of his conduct from that time, he seemed to have been infatuated by the terrors of his conscience; for it was but little less than frenzy. He
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† Mare Claus. 386. Kennet's historians. Hume. Carte.

knew he was, by this cruel act, become the detestation of his subjects in general, and that his father, in the midst of his power and popularity, had been humbled by the Pope ; and yet, at the same time, he trampled on the liberties of the former, and oppressed them in the most outrageous manner, and while his subjects were thus disaffected, he openly set the latter at defiance.

To this reign, however, so inglorious, and so miserable to the English of that age, do their successors owe the ascertaining their liberties. He was, if we except William Rufus, the first of the kings that openly professed to rule by arbitrary power. I do not mean to deny that every one of his predecessors from the Conquest had, in some particular or other encroached on their people, but then there were either peculiar circumstances of distress, that almost enforced and excused them, or one or two wrong steps were atoned for by the greatness and goodness of their general conduct. It is very observable, that, as England is almost the only country in Europe that hath preserved its liberties, so was it the first wherein the kings set up for absolute power : and the preservation of them, I apprehend, was in a great measure owing thereto, that this claim was started there when the feudal principles, and the spirit of independency, except only in feudal matters, were in their vigour, and consequently raised such a spirit of jealousy and watchfulness, as, though it hath sometimes slept, could never be extinguished ; whereas, in other countries, the progress of arbitrary power hath been more gradual. It hath made its advances when the feudal system was in its wane, and when the minds of men, by the introduction of the civil and canon law, were prepared for it.

WHAT encouraged the kings of England to attempt this sooner than other monarchs, we may judge, was the greater disparity in riches between them and their vassals, than was in other countries ; so that nothing much less than a general confederacy could curb them ; whereas, abroad, two or three potent vassals were an overmatch for the sovereign. Besides, having subjects on each side of the water, not knit together in any common interest, they might hope to use the one to quell the other. But whatever was the cause, so was the fact ; and John, even before the death of Arthur, having removed the dread of a competitor, shewed, by a most extraordinary step, what

what kind of sovereign he was like to prove. By the law of these days a vassal was to pay his relief to his superior out of his own demesnes, and the profits of his feignory, and had no right to demand aid for that purpose from his sub-vassals; John having detached Philip from his nephew's interest, by ceding a part of his French territories, was to pay twenty thousand marks for the relief of the rest; and, to receive this sum, he, by his own authority, laid three shillings on every hide of land in England; thus making England to pay that relief for his foreign dominions, which his foreign subjects themselves were not obliged to pay.

THE next instance was in favour of the Pope, under pretence of the holy war. Innocent had laid a tax upon the clergy, of the fortieth of their revenues, and sent a collector to England to gather it, whom John, of his own authority, empowered to collect it from the laity. These two impositions were submitted to, in as much as there was no plan of opposition then formed; but they afterwards occasioned great discontent among a people, who thought no taxes could be raised without their own consent. Accordingly, the next time he summoned his military tenants to attend him into France, they assembled at Leicester, and agreed to refuse attendance, unless he would restore their privileges; for though, by the law of the Conqueror, they were obliged to go, they looked upon this obligation as suspended by his behaviour. However, they had not yet sufficiently smarted, to unite them thoroughly, and this affair was made up by his accepting a scutage.

To enumerate all the exorbitancies he committed would be tedious, and unnecessary, as the remedies prescribed in *Magna Charta* sufficiently point out the grievances. Let it suffice to say, in general, that he oppressed his military tenants by exacting extravagant reliefs, by disparagement of heirs, by waiving his wards lands, by levying exorbitant scutages, by summoning them to war, and delaying them so long at the place of transportation that they were obliged to return home, having spent all their money; or, when they were transported, keeping them inactive till they were obliged to return for the same reason, and then, without trial, seizing their lands as forfeited. The same oppressions he extended to others, seized lands and tene-
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ments at will and pleasure, imprisoned whom he pleased, laid heavy talliages on the socage tenants and boroughs, without any regard to the privileges they had obtained from his predecessors; and having, by these means excited the detestation of his subjects, and forfeited his reputation by losing Normandy by his indolence, he took it into his head that he was a match for the Pope, and engaged in a contest with his Holiness, which subjected him and his kingdom to the Roman See, tho' eventually it contributed not a little to the recovery of his subjects liberties. † The manner in which this happened shall be the subject of the ensuing lecture.

† Brady, Daniel, Tyrrel, and the general histories of England.

LECTURE XXXVII.

John's dispute with the court of Rome—Cardinal Langton promoted to be Archbishop of Canterbury—Pope Innocent lays the kingdom under an interdict—John is excommunicated—His submission to Innocent—The discontents of the Barons—Magna Charta and Charta de Foresta—An examination of the question, Whether the rights and liberties, contained in these charters, are to be considered as the antient rights and liberties of the nation, or as the fruits of rebellion, and revocable by the successors of John?

IF Alexander the Third shewed the grandeur of the pontifical power in humbling Henry the Second, the displaying it in its full glory was reserved for Innocent the Third who now reigned, and who being promoted to the papacy at the age of thirty seven, had vigour of body and mind to carry every point he engaged in, and was resolved to push his power to the utmost. Having tasted the sweets of English gold, in the collection made under pretence of the holy war, he had a great desire to renew the experiment ; and that he might be able to proceed with the less opposition, was resolved to have an archbishop of Canterbury at his devotion ; and the See falling vacant, a controverted election furnished him with an opportunity.

THE election belonged to the convent of Christ-church, though it was contested with them by the suffragan bishops. The very night the archbishop died, a faction of the younger monks resolving to have an archbishop of their own chusing, assembled, and chose Reginald sub-prior of the convent, and sent him off before morning for Rome, to obtain the Pope's confirmation, of which they did not entertain any doubt, as it would be plucking a feather from the king's prerogative, that of a previous licence for proceeding to election ; and Innocent had already shewn that he looked on himself as monarch of monarchs. But as they could not expect the Pope would take this stride in support of a clandestine election, they all took an oath of secrecy, to be observed till the confirmation was obtained.

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BUT Reginald's vanity defeated the scheme, and made him divulge it, which so provoked his electors, that they joined with the others, petitioned the king for a license, and elected, at his recommendation, the bishop of Norwich, and twelve of the monks were dispatched to solicit his confirmation. The suffragan bishops opposed him, as being elected without their concurrence, which point was determined for the convent by Innocent; notwithstanding which, without assigning any invalidity in the second election, he annulled it as well as the first, and recommended to the twelve deputies to elect Stephen Langton, an Englishman and a cardinal. At first they demurred, as having no authority; but the threat of instant excommunication compelled them to obey. And then, as if they had done nothing out of the way, he recommended Langton to John in a very civil letter. The king, enraged to the highest, turned the monks of Canterbury, who were entirely innocent, out of their convent and the kingdom, and threatened the Pope that he would suffer no appeals. Innocent, who had before this humbled Philip of France by an interdict, and knew the man he had to deal with, proceeded very calmly, to order three bishops to exhort the king to receive Langton, and recall the monks; and, in case of non-compliance, to lay the kingdom under an interdict †.

THE name of interdict frightened John, who knew how much he was hated. He offered to comply, if he might be allowed to make a protestation of a saving his dignity and prerogative; but no salvo would be allowed; the interdict was published, Divine service ceased through the kingdom, except in a very few places, where some clergymen were found honest and bold enough to preach against the Pope's proceedings. John, in revenge, fleeced the clergy in a most horrible manner; and, what is yet more surprising, did not desist from oppressing the laity. However, as to the points in contest, he was not obstinate; he offered more than once to submit; but Innocent had more extensive views. There was no remission without he refunded to the churchmen every farthing he had extorted from them, a thing absolutely out of his power. Then followed, after successive delays calculated to shew that the holy father would give his undutiful son time to repent, a sentence of excommunication by name, a bull absolving his subjects from their oath of allegiance, and commanding all persons to

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Kennet's historians. Hume. Carte.

avoid his company ; and, lastly, a sentence of deposition, and a grant of all his dominions to the king of France, who had been invited also by John's subjects, whose patience had been by this time quite exhausted with his tyranny, and the suspension of the performance of Divine service.

PHILIP was very ready to execute this sentence, and assembled a numerous army. Randulf was sent, as the Pope's legate, to see the sentence of deposition put in execution ; but, in reality, with secret instructions of a very different nature ; for it was by no means Innocent's intention to give England to France, but to subject it to himself. John, terrified with the exaggerated account of Philip's armament, and the disaffection of his subjects, submitted in every point before in contest, and in one new one, that no clergyman should be outlawed. But this was not sufficient to avert the danger from Philip, and his own disaffected barons. To make him sacred and invulnerable, he became a vassal to the Pope, resigned his kingdom to him by a formal charter, and received it again as a favour, under homage, and a yearly rent of a thousand marks.

IN consideration of this submission, John was favoured in the point of indemnifying the clergy, which was what had so long retarded the accommodation. Innocent took the estimating this on himself, and having got all he wanted for the See of Rome, forgot his former clients the clergy, and was very moderate with his new vassal. However, the interdict was not removed, nor the king absolved from his excommunication, till Langton was put into possession ; which when done, John was obliged to renew his homage, to swear to defend church and clergy against all their adversaries, and to make restitution ; and then he was absolved. But there was one curious addition to this oath, which Langton, who was an Englishman, and a lover of liberty, certainly inserted of his own head, that he should restore the laws of the Confessor : For Innocent would never, we may be well assured, have allowed such privileges to his vassals. John, however, out of fear of Philip, being in an hurry to be absolved, made no objection ; and indeed he had no reason to doubt the Pope would absolve him from his oath. But Langton and the nobles were resolved to keep him strictly to it. Soon after, while he was in France, his regents summoned a parliament, wherein the king's peace was proclaimed, and the laws

laws of Henry the First were revived. These were those he had sworn to restore, being in truth the Confessor's, with a few additions and alterations by the Conqueror and Henry.

JOHN, however, went on in his old courses, being now sure of the Pope's protection, and indeed it was hard to charge him with a breach of Henry's charter, of which, though copies had been lodged in every cathedral and great abbey in England, yet so carefully were they destroyed, that not one appeared. At length archbishop Langton furnished them with one, which had escaped the general calamity ; and this the associated barons, who had determined to restrain John, and recover their liberties, made the basis of their demands, and swore to demand, and if refused, to vindicate with the sword, at a meeting they had at Edmundsbury under pretence of devotion. Accordingly, they waited on the king in a military dress, and made their demands ; but he, seeing they were only a party among the nobles, and not imagining the rest were of the same sentiments, not only refused, but with haughtiness insisted they should renounce them, by giving under their hands and seals, that they would never make the like demand on him or his successors. But his eyes were opened when he found scarce two or three of those that were with him would comply. He had recourse to procrastination, and promised them satisfaction at the latter end of Easter. In the interim he exacted a new oath of allegiance from his subjects ; a feeble precaution ; for none refused it, or thought themselves precluded by that act of duty from vindicating their rights in what manner they best might. To secure the clergy, he gave them a charter, confirming their immunities, and the entire freedom of their elections ; and yet a great multitude continued zealous for the liberty of the subject against him ; but his main dependance was on religion. To render his person sacred, he assumed the cross, as if he intended for the holy war, and implored the protection of his Holiness, to whom the discontented barons also represented the justice of their pretensions. Innocent, in appearance, received them favourably, advised them to represent their hardships in a decent and humble manner to the king, in which case he would interpose in favour of all their just and reasonable petitions ; but annulled their association, and forbade them to enter into any new one for the future.

THE barons, who sent to the Pope rather out of respect than any expectation of favour, proceeded in the method they began. They and their vassals assembled in array, in such numbers as to compose a formidable army; and when they had particularly specified their demands, and were refused, they proceeded to attack him, by reducing his castles. Against himself, as being under the cross, they made no attempt. On this occasion, archbishop Langton, who was at the bottom of the whole confederacy, outwitted John; who, as they had disobeyed the Pope, was impatient to have them excommunicated, and this the Pope promised to do as soon as the foreign troops, which the king had brought over for his defence, had quitted the kingdom; but when they were gone, he broke his engagement, so that John, left defenceless, was obliged to appoint four nobles to treat with the revolted lords; and, upon conference, some points they had insisted on before being given up, the liberties of the nation were settled, as contained in the two charters of *Magna Charta*, and *Charta de Foresta* †.

THE manner of obtaining these charters, and the right the people have to the liberties contained in them, have been the subject of much controversy between the favourers of arbitrary power and the assertors of freedom; the one, contending that they were the fruits of rebellion, extorted by force and fraud, from a prince unable to resist, and therefore revocable by him or his successors; and the others, that they were the antient privileges of the nation, which John had, contrary to his coronation-oath, invaded, and which they therefore had a right to reclaim by arms. That they were obtained by force, is undoubted, and that John and many of his successors looked upon them, therefore, as of no validity, is as clear, even from the argument lord Coke brings for their great weight, their being confirmed above twenty times by act of parliament. To what purpose so many confirmations, if the kings had not thought them invalid, and had not, on occasions, broke through them; and were it as clear that they were not the antient rights of the people, it must be owned they were extorted by rebellion. But that they were no other than confirmations, appears very plainly from the short detail I have heretofore given of the constitution and spirit of the monarchy of the Saxons, and all other northern nations.

† Blackstone's discourse concerning the hist. of the charters. Gurdon's hist. of Parliament. Hale, hist. com. law, ch. 7.

As to any new regulations introduced in them, as some there are, they are only precautions for the better securing those liberties the people were before entitled to, and it is a maxim of all laws, that he who has a right to a thing, hath a right to the means without which he cannot enjoy that thing.

THE friends, therefore, to absolute power, sensible that the original constitution is against them, choose to look no farther back than the Conquest. Then, say they, the Saxon government and laws were extinguished, the English by the Conquest lost their rights, the foreigners had no title to English liberties, and the Conqueror and his son William acted as despotic monarchs. Therefore, their successors had the same right, and it was treason to think of controuling them. But how little foundation there is for this doctrine, may appear from what I observed on the reign of the Conqueror. He claimed to be king on the same footing as his predecessors; he confirmed the Saxon laws, and consequently both Saxons and foreigners, when settled in the kingdom, had a right to them. If he oppressed the English, that oppression did not extend to all; and to those it did, it was not exercised as upon conquered slaves, but as upon revolted rebels. But, for argument sake, to allow that the English became slaves, and that the foreign lords had no right to the Saxon privileges, both which are false, how came the king to be despotic sovereign over them? They were partly his own subjects, freemen, according to the feudal principles, who served him as volunteers, for he had no right to command their service in England; or volunteers from other princes dominions, and to say that freemen and their posterity became slaves, because they are so kind as to conquer a kingdom for their leader, is a most extraordinary paradox.

BUT William the Conqueror, in some instances, and his son in all, acted as despotic princes; therefore they had a right so to do. I answer, the triumvirs proscribed hundreds of the best Romans, therefore they had a right. It is as unsafe to argue from matter of fact to matter of right, as from matter of right to matter of fact. It is as absurd to say, Tarquin ruled absolutely, therefore the Romans were rightfully his slaves, as to say the Romans had a right to liberty under him, therefore they were free.

BUT it may be said, the people quietly submitted and new rights may be acquired, and new laws made, by the tacit consent of prince and people, as well

well as by exprefs legislation. I allow it where the confent is undoubtedly voluntary, and hath continued uninterrupted for a long fpace of time ; and how voluntary this fubmiffion was, we may judge from the terms they made with Henry the Firft, before they fuffered him to mount the throne. Befides, there are fome points of liberty, effential to human nature, that cannot, either by exprefs or tacit laws, be given up, fuch as the natural right that an innocent man has to his life, his perfonal liberty, and the guidance of his actions, provided they are lawful, when the public good doth not neceffarily require a reftRAINT. In fhort, never was there a worfe caufe, or worfe defended ; and this maxim was what influenced the conduct of the Stuarts, and precipitated that unhappy houfe to their ruin.

JOHN, who entertained the fame fentiments, had no refource to recover his loft rights, as he thought them, but the affiftance of the Pope, and an army of foreigners. The firft very cordially efpoufed his intereft. He was provoked that he, who had humbled kings, fhould be controuled by petty lords, and that by thefe privileges he fhould be prevented from reaping that golden harveft he expected from England. He annulled the charters, commanded them to recede from them, and, on their difobedience, excommunicated them, firft in general, and then, by name.

ABOUT the fame time arrived an army of veteran foreigners, that came to affift John, who had, in imitation of the Conqueror, diftributed to them the eftates of the barons. With thefe and a few Englifh lords, he took the field, and ravaged the country with a more than Turkish barbarity. The confederate barons faw the liberties they had contended for annulled, their lives and eftates in the moft imminent danger, and, in a fit of defpair, invited Lewis, prince of France, to the crown, who, bringing over an army, faved them from immediate deftruction. However, this ftrengthened John. It was not for any to ftand neuter. Few chofe to embark in an excommunicated party, and many, who faw flavery unavoidable, and nothing left but the choice of a mafter, preferred their countryman for a king to a foreigner. The lofs of liberty now feemed certain, which ever prevailed ; when the haughtinefs of Lewis, and his want of confidence in the Englifh noblemen who joined him, concurring with the death of John, and the innocence of his infant fon, providentially preferved the freedom of England.

LECTURE XXXVIII.

The minority of Henry III.—Ecclesiastical grievances—The dispensing power—

The canon law—Confirmation of Magna Charta—A commentary on Magna

Charta, in so far as it relates to what now is law.

JOHN left his minor son under the guardianship of the earl of Pembroke, a nobleman of great abilities, and the strictest integrity. The first step he took for the benefit of his pupil, was the confirmation of the charters, and the next was a negotiation with the revolted lords, who began to be discontented with the prince of France; which succeeded so happily, that in a short time he brought them all over with very little bloodshed; and Lewis was obliged to quit the kingdom. Peace being re-established, the regent applied himself with all diligence to restore the peace of the kingdom, and justice to her regular course: And had he lived long enough to form the conduct and principles of the young king, England never had a fairer prospect of happiness; but he soon dying, and his successors being men of a different stamp, such principles were sown in the monarch's mind; as, in the event, produced bitter fruit both to him and the whole kingdom.

THIS reign was as calamitous as the preceeding one, and rather more shameful; and what added to the misfortune, it lasted three times as long. As soon as Henry came of age, he revoked *Magna Charta*, as being an act of his nonage, soon after he confirmed it, then broke it, then confirmed it by oath, with a solemn excommunication of all that should infringe it; then he obtained from the Pope a dispensation of his oath, and broke it again. And thus he fluctuated for fifty years, according as his hopes or fears prevailed. However, in general, the charter was pretty well observed. The great point it was infringed in, was the levying money without the parliament, and in this he frequently prevailed; being assisted by his Lord Paramount, the Pope. They joined in levying taxes, and then divided the spoil between them. Indeed, their Holinesses had, upon each occasion

sion, by much the greater share ; for they not only fleeced the clergy separately, but drew vast sums from the king, on pretence of a foolish project of making his younger son king of Sicily ; all which they squandered on their private occasions.

IN this reign they introduced the practice of provisorship, against which so many acts of parliament have been made. It went on this maxim, That the Pope was universal pastor of the church, and consequently sole judge who should be his deputy in any particular place. The inference necessarily followed, that the rights of patronage to livings, whether in a Bishop or lay patron, were, strictly speaking, no rights at all, being such only where the Pope did not chuse to interfere. But this privilege would have been of little significance, if they could act only in the vacancy of a living ; for it would generally have been filled up before he could have notice. Bulls of provisorships were, therefore, invented. These were charters of the Pope, directed to the bishop, acquainting him, that he had provided for such a person, by appointing him to such a benefice, when it should become vacant, or the first benefice of such a value that should fall ; strictly forbidding the Bishop to admit any other person, upon any account whatsoever. Sometimes the person provided for was not named ; but notice was to be given when the vacancy happened. In process of time a number of livings were reserved in the same bull ; nay, one went so far as to forbid any living that should fall to be filled, till the Pope had provided for three hundred persons. Such were the delightful consequences of John's homage, and of England becoming St. Peter's patrimony ; so that the monkish historians tell us that Rome sheared all Europe ; but in England they flayed off the skin. An account was taken at one time of the value of English benefices possessed by Italian priests, non-residents, and it was found to exceed the ordinary revenue of the crown. All these bulls concluded with a *non obstante*, that is, notwithstanding any laws, custom, privilege, right or patronage, or any thing else whatever ; and this hopeful precedent Henry the Third adopted in his charters, thereby, if he could not repeal, at least making ineffectual the laws of the land ; and thus began the king's claiming a *dispensing power* over the laws †.

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† Sir Robert Atkins on the dispensing power. Bibliotheca Politica. The general histories of England.

IN this meridian of the Pope's power was the canon law introduced into England, and it soon began to usurp considerably on the civil courts ; insomuch that, had not the common law judges exerted themselves to check the ecclesiastical court by prohibitions, which they did even in this reign, it would have gained the same ascendant that it has in the Pope's territory.

THE latter end of this reign was filled with a succession of troubles, occasioned by the repeated breaches of the charters, and fomented by the ambition of some of the great nobles ; however, in the end, the king prevailed, by the assistance of his son ; but it was found expedient, even in the midst of victory, in order to prevent future convulsions, to establish the liberties of England, by confirming *Magna Charta* ; and they have ever since stood their ground. I shall therefore proceed briefly to speak to *Magna Charta*, and in so doing shall omit almost all that relates to the feudal tenures, which makes the greatest part of it, and confine myself to that which now is law.

THE first chapter of *Magna Charta*, as confirmed in the 9th year of Henry, which is that now in force, and differs from that of John in some omissions, concerned the freedom of the church, in which was principally included the freedom of elections to Bishopricks, which, since the reformation, has been taken away. I shall, therefore, proceed to those that concern the laity ; the five next are feudal, and the seventh is concerning widows. It first gives them free liberty to marry or not ; whereas, before, such as were called the *king's widows*, that is, those who held lands, or whose husbands held lands of the king, had been obliged to pay for license to marry if they had a mind, or were distrained to marry, if they had no mind, which it is unnecessary to say was a grievous oppression. It restrains the taking any thing from the widow for her dower, or for her own land, which her husband had held in her right. It provides for her *quarantine*, that is, gives her leave to stay forty days in her husband's house, unless she had dower assigned to her before, and within that time orders the third part of her husband's land to be assigned her by the heir, as her dower ; and that, in the interim, she should have reasonable estovers †.

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† Ruffhead, vol. I.

THE next is in favour of the *king's debtors*, and their securities. By the old law, the king's profit was so highly favoured, that he could, to satisfy his debt, seize the chattels or extend, that is, take the profits of the real estate of his debtor, at his pleasure ; or he might, in the first instance, come on the security, without attacking the principal debtor. For remedy hereof, it forbids the king, or any of his officers, seizing the land, while the debtor's personal chattels are sufficient. It forbids, also, the distraining the securities, while the debtor's chattels were sufficient. If they were not, the king had the option either to seize the land of the debtor, or distrain the securities ; and if the latter was done, it provides, that the securities should have the land, until they are reimbursed. Immediately after this, in king John's charter, followed the law prohibiting the king from levying any talliage or tax on the socage tenants, or on boroughs, without assent of parliament, which is here omitted ; and this king and his son Edward asserted and exercised the right ; but the last was at length obliged to give it up, in the famous statute *de tallagio non concedendo*, and not till then were these ranks of the people entirely emancipated. This omission for a time rendered illu- sory the next, the ninth chapter, which provides that the city of London and all the other cities, boroughs, and ports, should enjoy all their ancient liberties and customs ; for these would be of little use whilst arbitrary taxation remained. The tenth is in affirmance of the common law, that no person should be distrained for more rent or services than he owed out of the land. If he was, he had a double remedy, either by *a suit in replevin*, or by the writ called *ne injuste vexes*. The next is for fixing the court of Common Pleas, of which I spoke already. The twelfth was for the ease of the people, by taking assizes in the country. But those actions are out of use now. The thirteenth is concerning assizes too. I hasten therefore to the fourteenth that treats of *amerciaments*.

AMERCIAMENTS come from the word *mercy*, and are so called from the words in the record, *sit in miserecordia pro falso clamore suo*, and were properly, though the word hath been since extended, what a plaintiff or defendant that had troubled the king's courts should pay by way of punishment for maintaining an unjust suit ; whereas *fines*, to which they bear a resemblance, and with which they have sometimes been confounded, were for of- fences,

fences, and assessed by the court; as were amerciaments also sometimes, and very grievously, though entirely against law. This act restores the common law; orders the amerciaments to be proportioned to the nature of the case, and also, in regard to the man's circumstances, so that he should not be ruined thereby; that no freeholder should be amerced in so heavy a manner as to destroy his freehold; no merchant, his merchandize; no villain, his carts, whereby he would be unable to do his lord's services; no ecclesiastic according to the value of his benefice, but only according to his lay property. And that this might be constantly observed, the amerciaments were to be asserted, or settled by the man's peers. It may be asked, what remedy had the man, who was too severely amerced by his peers? On this act was grounded the writ of *moderata misericordia*, whereby this amerciament may be tried by another jury, and moderated.

THE fifteenth provides, that none should be distrained to repair bridges, or landing places, but who are bound by their tenures or custom. The sixteenth for the free navigation in rivers, and unloading of goods. The seventeenth takes away the power of trying pleas of the crown from sheriffs, constables and coroners, and other inferior officers; a very necessary law, upon account of the great value of the life of an individual, especially as none but the king's courts could give the benefit of clergy. However, sheriffs and coroners can take *indictments*; for that is not *trying*, but bringing the matter into a method of trial. The eighteenth concerns debts due to the king where his debtor is dead. By this law, the first duty of executors is to pay the debts of the deceased; those of the highest nature, not as to *value*, but in *quality*, in the first place, then the lower ones: and if the effects were not sufficient, it was in their option to pay one creditor of the same nature without another, so that they observed the rule of not paying the lower debtor before the higher. But the king, be his debts of what nature they would, by his prerogative, had the preference of all creditors, and by colour hereof his officers often seized and embezzled the effects of the deceased, to the prejudice of other creditors and legatees. This orders the sheriff to attach and value the goods by a jury of twelve men, to the value of the debt, which were to remain unremoved, till the king was paid; and then the whole, or, if not, the overplus, to be restored to the

executors. The two next are feudal. The twenty-first relates to purveyorship, which has been abolished.

THE twenty-second relates to the king's right to the lands of felons. On which there is something curious to be observed. By attainder of felony, the goods and chattels of the felon are forfeited to the king, and the land to the lord from whom they were holden; but in case of treason, both were forfeited to the king. Such was the feudal law; but by the law of England, in order to deter persons from committing felony, and to make the lords more careful what kind of tenants they chose, the king had an interest in the land of felons; not for his own benefit indeed, but for the terrifying by example. He had a right to commit waste in them, to cut down the trees, to demolish the houses and improvements, and to plow up the meadows; and for this purpose he was allowed, by common law, a year and a day. To prevent this destruction, the lords, to whom the land escheated frequently, by a fine, bought off the king's right of waste; but if they did not, his officers would take the profits for the time, and then hold it longer, till they had committed the waste. This act prohibits the retaining the land longer than a year and a day, and directs that then it should be restored to the lord. This new law was certainly intended for the public good, to prevent this malicious wasting, which the king's officers would be sure to commit, if they were not properly, as they thought, considered; and to give the king, in lieu of the waste that he had a right to make, a lawful profit, which his officers had unlawfully, to their own use, we may be sure, extorted before. It gives the custody of the lands for that time, and consequently the profits. But observe the consequence.

THE king now had the custody, as also the profits, by a legal title for a year and a day, unless the lord pleased to compound with him, and so intitle himself to the immediate possession. But this did not satisfy the greediness of the officers of the crown. It was easy to gather the profits until very near the time the king's right expired, and then, for a week or fortnight before it was out, they had it in their power to commit waste enough, if the lord, who was intitled by the escheat, did not buy them out. This was

was certainly against the spirit of the law whereof we are speaking, which was intended to give the king a real profit, instead of a right destructive to the community in general; but the waste was not prohibited expressly, and this was pretext enough for these officers to exact composition for not doing it within the year. It was accordingly claimed and paid, and accounted for as due to the king, on that old maxim, That general laws do not change the prerogative royal, but by express words. This was the doctrine and practice in the courts of the third Henry, and convenient enough for him, who was always indigent. But what was the opinion of the lawyers of that age, we may learn from Bracton, Britton, and the author of Fleta; the first of which wrote in the latter end of this reign, and the other two in the reign following. Bracton says expressly, that “the king’s power over the lands of felons convicted, was because he
 “ had a right to throw down the buildings, unroot the gardens, and plow up
 “ the meadows; but because such things turned to the great damage of the
 “ lords, it was provided, for common utility, that such houses, gardens,
 “ and meadows should remain, and that the king for this should have the
 “ advantage of the whole land for a year and a day, and so every thing
 “ should return entire to the lord. Then he goes on, but now both is
 “ demanded, namely, a fine for the term, likewise for the waste, nor
 “ do I see the reason why *.” Thus far Bracton. Britton says, speaking in the person of the king, of felons, for in that manner his book is written,
 “ Their moveables are ours; their heirs are disinherited; and we will
 “ have their tenements, of whatsoever holden, for a year and a day, so
 “ that they shall remain in our hands that year and day, and that we shall
 “ not cause to perish the tenements, nor hurt the woods, nor plow the
 “ meadows, as hath been accustomed in time past †.” Fleta talks in the same strain, in commenting on this law of *Magna-Charta*, which he expressly quotes, that, as a mark of brand on felony, it had been antiently provided that the houses should be thrown down, and so goes on to enumerate the other species of waste, which I need not here repeat, as I have mentioned them already; and then he says “because by such doings
 “ great damage would accrue to the lords of the fiefs; for common utility it was provided, that such hardships and severities should cease:
 “ and

* Lib. 3. p. 129. 137.

† Cap. 5.

“ and that the king, in consideration thereof, should, for a year and a day, enjoy the commodity of the whole land ; after which term it should return to the lords of the propriety entirely, without waste or destruction †.” The *Mirror*, another antient law-book, joins with these ; and this book, which was written in the same reign of Edward the first, or, at the latest, in that of his son, says, “ the point of felons lands being held for the year is difused ; for by that, the king ought not to have but the waste by right, or the year, in name, (that is, in nature) of a fine ; to save the fief from *estrepement* (that is, waste), the ministers of the king take both the one and the other ‡.” A melancholy consideration, that, under his name, and in pretence of his profit, though not really to his advantage, such a law should, for their own profit, be eluded by his ministers ; as by these testimonies, one cotemporary, and the rest immediately subsequent, we are informed it was contrary to the intention of this chapter of *Magna Charta* ; but the practice prevailed for a long time after. I shall conclude this lecture with the words of Lord Coke on this chapter of *Magna Charta*. “ Out of these old books you may observe, that when any thing is given to the king, in lieu or satisfaction of *an antient right of his crown*, when once he is in possession of the new recompence, and the same in charge, his officers and ministers will many times demand the old also, which may turn to great prejudice, if it be not duly and discreetly prevented ||”.

† Lib. 1. cap. 28.

‡ Cap. 5.

|| 2 Inst. p. 37.

L E C T U R E XXXIX.

Continuation of the commentary on Magna Charta.

THE twenty-third chapter of *Magna Charta* prohibits *fish weires* in rivers, which are great annoyances to navigation, and the free liberty of fishing; and which have stood their ground in spite of all the laws that can be made against them. The next relates to the inferior courts of Lords of Manors, and to writs of *Præcipe in capite*; which having gone into disuse, with the feudal tenures, I shall pass them over. The twenty-fifth orders, that measures and weights should be one and the same through the whole kingdom; witness the difference between Troy weight and Averdupois; the wine gallon and ale gallon. Established customs, which of necessity must come into daily practice, are hard to be rooted out by positive laws; and indeed it is more prudent to let them continue. For the confusion that such an alteration of things in daily or hourly practice would occasion, would be more detrimental, for a considerable time at least, than the uniformity intended to be introduced would be attended with advantage †.

THE twenty-sixth is concerning the writ *De odio et atia*, that is, of hatred and malice; which, though not abolished, hath long since been antiquated; but, as it was an antient provision for restoring the liberty of the subject, I shall take some notice of it. It was a maxim of the common law, that no man imprisoned for any offence, which, if proved, would touch his life or members, could be bailed out but by the supreme criminal court, the King's Bench; which, upon danger of death, or such other special causes as appeared sufficient to them, had that power. Hence, in those unsettled and oppressive times, it became a practice for malicious persons to have a man clapped up in prison for a capital offence, without either indictment or appeal brought against him; and there he was of necessity to lie, until the justice in eyre came into the county to deliver the
gaols

† 2 Inst. 38. 41. Barrington on the Statutes, p. 15. 16

gaols, which regularly was but once in seven years ; to avoid this hardship, the writ we are now speaking of was invented, and issued out from time to time, as occasion required, out of the Chancery. Besides, by this chapter of *Magna Charta*, it is ordered to be granted without any purchase or reward ; whereas, before, all the original writs were purchased at the price the chancellor pleased to set on them, which was a grievous oppression. It ordered the sheriff to make inquisition in the county court, by the oath of a jury, whether the imprisonment proceeded from malice or not. If they found it did, upon its return, the person accused had a right to a writ, ordering the sheriff to bail him by twelve *manucaptors*, or securities. But, this was only where there was no indictment, or appeal ; for these were accusations of record, and therefore the finding the charge malicious in the county court, which was no court of record, could not avail against them. This writ has gone into disuse, since justices of gaol-delivery have continued to go into every county twice a year ; a proceeding which has evidently superseded the necessity of it †.

THE twenty-seventh chapter restrains the unjust practice in the king, of arrogating to himself the wardship of his socage or burgage tenants, where they held lands by military service from others, his subjects. The whole military system hath since been dissolved by act of parliament, and therefore it will be unnecessary for me to explain or enlarge upon the nature of the mischief complained of in this chapter. The next forbids any judge or officer of the king to oblige a man to *wage his law*, that is, swear to his innocence, except in a cause where a suit was instituted against him ; but *wager of law*, being now totally fallen into disuse, I hasten to the twenty-ninth chapter, the corner-stone of the English liberties, made in affirmance of the old common law ‡.

By the bare reading of this chapter, we may learn the extravagances of John's reign, which it was intended to redress. It consists of two parts. The first runs thus : *Nullus liber homo capiatur, vel imprisonetur, aut disseisetur, de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur*

† Mirror, cap. 5. sect. 2. Glanvil, lib. 14. cap. 3. Bracton, lib. 3. p. 121. Fleta, lib. 1. cap. 23.

‡ 2 Inst. p. 43. 45.

utlagetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ.

First, then, to see to whom this act extends : the words *liber homo*, in ancient acts of parliament, is, in general, rightly construed *freeholders*, and so it means here, in the second branch which prohibits disseisins ; for none but a freeholder is capable of being disseised, no others being said to have a seisin of land. But it must not, throughout the whole of this act, be confined to this limited sense. The first branch speaks of the restraint of liberty ; the third, of unjust outlawries ; the fourth, of unjust banishment ; the fifth, of any kind of destruction, or wrongs ; which, offered to an innocent person, are against the natural rights of mankind, and therefore, the remedy must extend to all : and so it hath always been understood ; for women are included in it, and so are villeins, for they are free men against all but their lord.

LET us next consider the end of this part, which is an exception running through the whole ; *nisi per legale iudicium parium suorum, vel per legem terræ*. That is, by the common law, which doth not, in all these cases, require a trial by peers ; a thing indeed impossible, where the party doth not appear ; in which case there is a necessity of proceeding to judgment another way. Coke observes, the words *legale iudicium parium suorum* include the trial both of lords and commons, the finding of the latter being upon oath, and called *Verdictum*, and in which all must be unanimous ; wherein it differs from the trial of lords, for they find not upon oath, but upon honour ; and it is not necessary that all should agree, the majority, provided that majority consists of twelve, being sufficient †.

UPON this a question may be put, who are the peers of a woman of quality ? If she be noble by blood, that is, a peeress, (for I speak not of the nobility by courtesy, which is merely nominal) there is no doubt but the barons and other noblemen ; if she be ennobled by marrying a peer, she becomes in law one person with her husband, and therefore must have the same peers with him, which right continues after her husband's death, unless she marries a commoner ; for then, being one person with him, she becomes a commoner ; whereas a peeress, in her own right, marrying a

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commoner,

† 2. Institut. p. 48. 49.

commoner, forfeits not her dignity, though she becomes one person with him. She was not ennobled by her own act, and therefore, by no act of her own can destroy that nobility she has by the gift of God, or the king, by means of her blood, which she cannot alter.

Two exceptions, however, there are to the rule of every Englishman's being tried for offences by his peers ; but neither of them against the purport of this statute. First, the statute speaks in the disjunctive, *per legale judicium parium suorum, aut per legem terræ* : now the *lex terræ*, the common law, in the universal practice of it, allows these exceptions ; nor will they be found to be against the letter ; for the words are *nec super eum ibimus, nec super eum mittemus*, speaking in the person of the king ; which shews that it is meant of the accusation or other suit of the king. Now these exceptions are not at his suit. One of these exceptions I mentioned in a former lecture. It is where a commoner is impeached by the commons in parliament ; and the reason I then gave, is, I think, plain and satisfactory, that every jury that could be summoned is supposed a party to the charge brought by their representatives, and therefore, as the man is accused as an enemy to the king by the body of the people, that there may not be a failure of justice, the lords, as the only indifferent persons, must be the judges.

THE other exception may seem more extraordinary. It is that a lord of parliament appealed, that is, accused of a crime, by a private person, not for the satisfaction of public justice, but of his own private wrong, shall not be tried by his peers, but by a jury of commoners. When this law was introduced, the lords were few in number, immensely rich and powerful, linked together frequently by alliances, almost always by factions. In this towering situation, they looked down on the lower ranks with disdain ; frequently injured and oppressed them ; and little prospect would the poor commoner have of redress, were the criminal to be tried by those of his own rank, several of them his relations, most of them liable to be suspected of the same offences ; especially, as the law will not allow a lord to be challenged. Neither did the lord run any extraordinary risk of being unjustly condemned. The lower rank of people in all countries and ages have

have been used to look with respect on persons possessed of great wealth and power, invested with titles of honour, and dignified by blood of an ancient descent. But, in those military ages, such veneration was highly increased by that valour and personal bravery, which distinguished every one of the nobility, and than which no virtue is more apt to captivate, in general, the hearts of mankind. Besides, that the lord had his advantage of challenging suspected jurors; whereas, if tried by his peers, he had not such privilege of exception, though they were ever so notoriously his enemies. Every commoner almost, how great soever, was, in those days, under the influence of some one or other of the lords, and there could be little doubt but that influence would be exerted, and successfully too, unless the guilt was too clear and evident.

It may here be asked, When a civil suit is depending between a lord and a commoner, how the issue is to be tried, whether by the lords alone, or by commoners only, or by a jury composed of an equal number of each; in the same manner, as, when an alien is tried, it is by a jury half natives, half aliens? The answer is, it shall be tried by a jury of commoners; only, on account of the dignity of the lord, there must be a knight on the jury. I need not enlarge on the reason, as it is the same with the former, the lesser danger of partiality.

I now come to the other part of the disjunctive, *aut per legem terræ*; and it will be necessary to point out in general (for to descend into particulars, would carry me a great deal too far) the principal cases, where this *lex terræ* supercedes the trial *per pares*. First, then, if a man accused of a crime pleads guilty, so that there is no doubt of the fact, it would be an absurd and useless delay to summon a jury, to find what is already admitted: accordingly, by the *lex terræ* judgment is given on the confession. So in a civil action, if the defendant confesses the action, or if he appears, and afterwards, when he should defend himself, makes default, and will not plead (which case is equivalent to confession) no jury is requisite. So, if both parties plead all the matters material in the case, and a demurrer is joined, that is, the facts agreed on both sides, and only the matter of right, depending on the facts already allowed, in contest, the judges shall try by

demurrer, and give judgment according to *law* without a jury. The general rule is, that a jury shall try *facts*, and the judges the *law*; for it would carry a face of absurdity to expect from a common, or indeed, from any jury, a decision of a point of law that is controverted between the lawyers of the plaintiff and defendant, who have made that science their particular study. Besides, as the law inflicts so heavy a punishment on jurors who give a false verdict, it would be the utmost cruelty to force men unpractised in law to run such a hazard, where it must be supposed an equal chance, at least, they may mistake. The same dangers that the jurors would run by mistaking the law, hath, in points complicated both of law and fact, introduced *special verdicts*, that is, the finding of all the facts by the jury, and the leaving the matter of right to be judged by the court, who best know the law: but this by way of digression.

ALL the proceedings of courts to bring causes to a hearing previous to the impannelling a jury, and the carrying judgments into execution, are *per legem terræ*, or, as my Lord Coke expresses it, the due process of the law is *lex terræ*. The inflicting of punishment by the discretion of courts for all contempts of their authority, without the intervention of a jury, is also, I think part of the *lex terræ*, and founded in the necessity of enforcing due respect and obedience to courts of justice, and supporting their due dignity. The outlawing a person who absconds, and cannot be found, so as to oblige him to answer a charge against him, whether civil or criminal, is one of these proceedings *per legem terræ* without a jury; of which, as I have now occasion, it will not be amiss to give a short account, as it is in daily practice †.

By the very antient law of England, the consequence of outlawry was very troublesome. Not only a seizure of the person, lands and goods, was lawful, but he was looked upon, not, merely, as one out of the protection of the law, but also as a publick enemy; for whoever met him had a right to slay him. This barbarous law undoubtedly proceeded hence, that no person was then ever outlawed but for a felony; that is, a crime whose punishment was death; but it was a most absurd thing to allow every private person to execute the offender, who by refusing to answer has confessed himself

† 2. Institut. p. 51.

himself guilty: and the absurdity became more glaring, when, about Henry the Third's time, process of outlawry began to be extended to all trespasses committed *vi et armis*, when the consequences were so dreadful. Such extension seems surprising; yet the turbulent condition of the times will, in some measure, account for it; when, under pretence of dormant titles, forcible possessions, not without frequent bloodshed and murders, were daily taken by the adherents of the king or barons, as their respective parties prevailed. But when the times grew peaceable, this bloody maxim wore out, and in the beginning of Edward the Third's reign, it was resolved by all the judges, that the putting any man to death, except by the sheriff, and even by him without due warrant in law, however outlawed and convicted, was murder; and since the forementioned times, as the number of people encreased, and the opportunities of concealment and absconding along with them, it has been found necessary to grant the process of outlawry in many civil actions.

I SHALL briefly point out the proceedings therein, to shew the abundant care the law of England takes, on the one hand, to do justice to the plaintiff, if the defendant absconds, and will not appear; and, on the other, that the defendant may have all possible opportunity of notice before the outlawry be pronounced against him. First, there issue three writs successively, to take the body of the defendant, if found in his bailywick or county, and to bring him to answer. The first is called a *capias*, from that mandatory word in the writ. When the sheriff cannot find him in his bailywick, he returns a *non est inventus* on the back of the writ, on which there issues a second *capias*, called an *alias*, from its reciting that *alias*, or before this, the like writ had issued. On the same return of *non est inventus* to this (for if upon any of the processes the defendant is taken, or comes voluntarily in, so as to answer, the end is obtained, and no further proceedings to outlawry go on), the third writ issues called a *pluries*, because it recites the sheriff had been *pluries*, that is, twice before, commanded to take him. The sending these three writs, one after the other, in order to bring in the party is, I presume (as, undoubtedly many of the antient practices in our courts of law are) borrowed from the civil law; for by that law they issued three citations, at the distance of ten days, one after another, to call in the party to answer.

BUT

BUT as, upon a return of a *non est inventus* on the third *capias*, the personal apprehending the defendant may well be despaired of, the law proceeds another way ; in order, if possible, to give him notice, that is by issuing the writ of *exigent*, so called from the Latin word *exigere*, to *require*, or *call upon*. This writ commands the sheriff to call the defendant in his county-court, where all the persons of the county are supposed to have business, or at least some that can inform him might have. The words are, *We command you that you cause such a one to be required from county-court to county-court, until, according to the law and custom of our realm, he be outlawed if he doth not appear. And if he do appear, him to take, and safely keep, and so forth.* Now the law and custom of the realm requires, in this case, that the party should be called on five different county-court days, one after another, before he can be outlawed ; and these courts being held at the distance of four weeks from each other, the interval amounts to sixteen weeks, besides the time of the three previous *capias's* ; a time so abundantly sufficient, as it is scarce to be presumed possible a person living in the county should not have notice ; and consequently, on his not appearing in the fifth court, the coroners of the county, whose duty it is, give judgment of outlawry against him.

SUCH is the care the common law takes to prevent outlawries by surprise. But the act of the thirty-first of Elizabeth in England, enacted here in the eleventh of James, had superadded another caution, namely three publick proclamations. The reason of this superadded caution was, I presume, on account of the dwindling of the business in the county-courts, and, in consequence, their being not so well attended. This writ, commanding the sheriff to make proclamation, issues with the *exigent*, and recites it, and the cause for which the proceeding to an outlawry is, and directs him to proclaim the party three several days ; first in the county-court, secondly at the quarter-sessions, a court of more resort, and lastly on a Sunday immediately after Divine service, at the most usual door of the church of the parish, where the person dwelt at the time the *exigent* issued ; or if no church, in the church-yard of the parish ; or if no parish, at the nearest church, and

and all outlawries in personal actions, where these solemnities are not observed, are declared void.

I HAVE been the more particular on this head, to shew the abundant care the law has taken in these proceedings, and to vindicate it from the common complaint, of outlawries being obtained surreptitiously, and without notice. I am sensible such complaints are generally without foundation; but if in any case they are just, the fault is not in the law, but in man, in the laws not being duly executed; and if we are to complain of the best laws, until they be in all cases perfectly and uprightly executed, we shall never cease complaining while human nature is what it is, weak and corrupt †.

† 2 Inst. p. 51. 55.

LECTURE XL.

Continuation of the commentary on Magna Charta.

HAVING mentioned the several kinds of proceeding to judgment without the intervention of juries, practised by the courts of common law, and authorised under the words of this statute, *per legem terræ*, it will be proper, before I quit this head, to say something of other kinds of courts which do not admit this method of trial; which, yet, have been received, and allowed authority in England; and whose proceedings, however different from those of the common law, are justified by the same words, *per legem terræ*. These are the courts *ecclesiastical*, *maritime*, and *military*.

IF we trace back the origin of ecclesiastical jurisdictions, we shall find its source in that advice of St. Paul, who reproves the new christians for scandalising their profession, by carrying on law-suits against each other before heathen judges, and recommends their leaving all matters in dispute between them to the decision of the *Ecclesiæ*, or the congregation of the faithful. In the fervour of the zeal of these times, this counsel was soon followed as a law. The heathen tribunals scarce ever heard of any of their controversies. They were all carried before the bishop, who, with his clergy, presided in the congregation; and who, from the deference the laity paid them, became at length the sole judges, as, in after ages, the bishop became sole judge, to the exclusion of his clergy. These judges, however, being, properly speaking, only *arbitrators*, had no coercive power to enforce their judgments. They were obliged, therefore, to make use of that only means they had of bringing the refractory to submission, namely, excluding them from the rights of the church, and warning other Christians against their company, and indeed, it was an effectual one; for what could a Christian, despised and abhorred by the heathen, and shut out from the commerce of his brethren, do, but submit? Besides, if he was really a
Christian

Christian, this proceeding seems founded on the words of the Apostle, “ He
 “ that will not hear the *ecclesia*, the congregation, let him be unto thee as
 “ an heathen†.”

THUS was *excommunication* the only process in the primitive church to enforce obedience, as it is in ecclesiastical courts at this day ; though, considering the many petty and trifling occasions on which they are, of necessity, obliged to have recourse to these arms, having no other, and the many temporal inconveniencies it may be attended with, it has been the opinion of many wise and learned, as well as of many pious men, that it would not be unworthy the attention of the legislature to devise some other coercive means for the punishment of contempts, and to restrain excommunication to extraordinary offences only. Though, if we consider that the jealousy which the temporal courts, and the laity in general, so justly conceived of these judicatures in the time of popery, hath not even yet entirely subsided, there is little prospect that this or any other regulation to amend their proceedings, and others they do want, will be attempted.

WHEN the empire became Christian, these courts and their authority were fully established in the minds of the people. However, that the temporal courts might not be stripped of their jurisdiction, and churchmen become the sole judges, a distinction was made between matters of spiritual and temporal cognizance ; not but several matters, originally and naturally temporal, were allowed, by the grants of the emperors, to the ecclesiastical jurisdiction ; and even, of such as were not allowed them, they might take cognizance, if both the parties agreed thereto. This was called *proroguing* the jurisdiction, that is, extending, by the consent of the litigants, its power to matters that do not properly belong to it. A practice our law has most justly rejected ; for it would introduce confusion, and a perpetual clashing of courts, if it was in the power of the private persons to break down the fences that the constitution has so wisely erected to keep every judicature within its strict bounds. And indeed this practice was one of the great engines the churchmen made use of, in their grand scheme of swallowing up all temporal jurisdiction and power. The method of trial in these courts was by the depositions of witnesses ; and upon them the judge determined both the law and the fact.

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TRIALS

†: Father Pau', of beneficiary matters.

TRIALS by jury were entirely unknown to the Romans, though indeed their *centumviral court*, in the early times, bore some resemblance to them; and even when the northern nations, who were the introducers of the trial *per pares*, became Christians, the ecclesiastical courts on the continent proceeded in their old manner. But in England, during the times of the Saxons, both spiritual and temporal courts, though their business was distinct, sat together, and mutually assisted each other, as I observed under the Conqueror's reign. But whether the matter of fact in ecclesiastical causes was then tried by a jury, I will not pretend to affirm, though, from the peculiar fondness the Saxons had, above the other northern nations, for that method of trial, it may seem not improbable. However, this is certain, that from the time William, who, to gratify the court of Rome, and to shew his own political purposes, separated the courts, the proceedings of the spiritual ones in England have been conformed to the practice of those courts abroad, and to the canon law. The alteration, if indeed there was any, was sufficiently authorised by the king and pope; and indeed as all the bishoprics were filled by Normans, they knew not how to proceed in any other manner. By the time of John, the proceedings of these courts, and their trial of causes without jury, had been universally fixed, and received as a part of the *lex terræ*, and, as such, is confirmed by the words of this statute.

THE next court that the law of the land allows to proceed to sentence without a jury is the Court of *Admiralty*, and that for absolute necessity; for as its jurisdiction is not allowed as to any thing that happens within the body of a county, except in one particular instance, *contracts for sailors wages*, but extends only to things done on the sea, or at most to contracts made in foreign countries (though this last is denied by the lawyers of our days to belong to them) there is no place from whence a jury can come. For the jury of the county, where the cause of suit arose, are the triers, but here, it arose in none. Besides, the great excellency of this method of trial consists in this, that the jury, from their vicinity, have opportunities of knowing something of the nature of the case, and of being acquainted with the characters and credit of the witnesses, neither of which can be supposed in this case. In this court the judge determines both matter of law and fact.

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THE same was the case of the Constable's and Marshal's Court, formerly of great power, but now next to antiquated. Its jurisdiction was, first, *martial law*, over the soldiers and attendants of the camp. Now the trial of offenders in this kind, by a jury, whether taken out of the army, or out of the county, if in the kingdom, would have effectually destroyed that strict subordination, which is the soul of military enterprises. Secondly, they had the trials of treasons and felonies done by the king's subjects in foreign kingdoms. Here there could be no trial by jury, for the same reason as given already for the Court of Admiralty. The last part of their jurisdiction was as to precedence, arms, and marks of dignity, which flowing immediately from the grace of the crown, the sole disposer and judge of them, were not supposed to be in the cognizance of jurors, but proper to be determined by the king's judges, who had the keeping of the memorials of his grants in this kind. Besides, these honorary distinctions are not local, but universal through the realm; so that there is no particular county from whence a jury should come †.

SUCH are the reasons assigned why these two courts proceed *per legem terræ*, and not by juries; but, to speak my own opinion truly, when I consider that their methods are formed upon the proceedings of the civil law, I suspect a farther design. The discovery and revival of this law happened in the reign of our Stephen. I have already had occasion to observe how greatly the princes, in every part of Europe, were flattered by the tempting bait of unlimited power it set before them, and particularly the kings of England, who were the first that set out in pursuit of this delusive object; and that their being less successful than others was, very probably, owing to their beginning the career too early. When I consider then that these two courts, where trials by juries prevail not, dealt in matters that were of the resort of the prerogative, and that, in consequence, the modelling of them was left to the king; when I see all the parts of these models taken from the imperial law; when I reflect on the notoriously avowed and unjust preference the weakest of them gave to that against the common law, and the kind patronage the wisest and most moderate of them shewed to it, and its possessions, down to the reign of Charles the Second, I can-

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not

† 4. Institut.

not help suspecting a deeper design. And, indeed, the common lawyers seemed to take the alarm, and decried and despised every part of this law, though most of it is founded on good reason, merely out of the apprehensions, that giving it the least countenance, might, in time, open a door for the absolute authority of the prince, and the rapaciousness of his *ffice* or treasury, and thereby overturn the constitution.

BUT there are other courts, besides those already named, that proceed upon the deposition of witnesses, and not by jury, I mean the courts of Equity; which, in imitation of the civil and canon laws, oblige a party to answer upon oath to his adversary's charge. This practice, though not allowed by common law, is founded in very good reason. For, as the proper business of a court of equity is to detect fraud and surprize, these things being done in private, and endeavoured to be as much concealed as possible, it is but reasonable that the plaintiff should have power to sift the conscience of his adversary, and to examine not to a single point, as the *issues* at common law are, but to many separate facts, from which, taken together, the fraud, if any, may appear. Such matters, therefore, being of nice discussion, and of a complicated nature, are not fit for the decision of a jury, and indeed would take up more time than they could possibly employ in the examination. The court, therefore, go upon *depositions*, and judge both of the law and fact. However, if a matter of fact, necessary for the decision of the cause, appears on the deposition doubtful; or if any matter arise which these courts have no power to try, they direct an issue, wherein the point is tried by jury, in a court of common law; and thus, these courts have the advantage of both methods of trial, as well that of the civil, as that used by the common law; namely the oath of the party, and depositions from one, and the trial by jury from the other.

This method, however, of trial by deposition, has been objected to, as productive of enormous expence and delays; and it cannot be denied, that, as affairs are now conducted, there is too much reason for the objection. Yet to this it may be answered, that if examiners were more careful, and would set down nothing but what is evidence, and were the rules of court, to cut off delays, always strictly enforced, the damage arising from both these heads would be considerably lessened. To cut off all delays, and to reduce the proceedings to as summary a method as that of the courts of common law would,

would, (considering the matters they are conversant about are of different proof, and require the most acute examination) instead of preventing frauds in most instances, by a hurried manner of trial, serve to defend and encourage them. The policy of the common law was to reduce the matter in question to a single fact, which the jury might, with ease and convenience, determine within a convenient time. And it must be owned that the lawyers and judges of latter days, by admitting the trial of titles to lands in personal actions, have deviated much from the simplicity of the law, and weakened the excellence of the trial by jury. The present practice, of determining the title to land by an action of trespass, will serve as an instance; where the enquiry is, whether a man's entering upon lands was a trespass or not; if he had right to enter in, it was no trespass; if he had not, it was otherwise. Now, as the right may depend upon twenty different matters of fact, beside matters of law, all which must be settled and weighed, before the bare question of trespass can be determined, it is easy to see to what lengths trial by juries may be now spun; to how short a time the examination of the most material points must be confined; how imperfect, consequently, the examination must often be; to say nothing of the danger of a jury's erring when both body and mind is wearied out with long attendance, and the attention consequently enfeebled.

If it be asked, how came this deviation, which has been attended with so many inconveniencies? The true answer is the best, that it sprung from the advantage of practitioners, and the litigiousness of suitors. By the common law, no man could bring two actions of the same nature for the same thing. If I am entitled to the possession of lands, I may bring my *writ of entry*, or an *assize*, to recover it; but if I am foiled, I cannot bring a second. So, if I am entitled to the propriety of the land, I may bring my writ of right, and if I recover not therein, my right is gone for ever. The litigiousness of suitors, who had a mind to gain a method of trying the same thing over and over again, where they miscarried, introduced this method I am speaking of. For every new entry was a new trespass, and could not be said to have been tried before; though whether it was a trespass or not, depends on what had been tried before, and the avarice of practitioners, who desired frequent suits, encouraged it. But when once it was allowed, notwithstanding all the complaints of Coke and his co-temporary judges, it became universally followed, and is now so established, and the
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higher actions so much out of use, that I question whether there is a lawyer living who would be able, without a great deal of study, to conduct a cause in one of those antiquated real actions. The inconveniencies of these frequent trials introduced, for the obviating them, a new practice, the applying to the court of chancery, after two or more verdicts consonant to one another, for an injunction to stop farther proceedings at law; which, though a new, was become a necessary curb, after the common law-courts had allowed the former method.

BESIDES these courts already mentioned, there are many other judicatories, which, by particular acts of parliament, have particular matters entrusted to their determination, without the intervention of juries; as the several matters determinable summarily by one or more justices of the peace; the affairs of the revenue by the commissioners; and suits by civil bills for limited sums by judges of assize; though in these last the presiding judge may, and ought, in matters of difficulty, to call a jury to his assistance; and it must be owned in this poor country the alteration of the law in this last particular, has been attended with very good consequences. The expediency of the two former changes, indeed, has been much disputed; but that being a question of *politicks*, not of law, I shall not enter into it.

THUS much I have observed, in a summary way, concerning the several methods of trial, differing from that *per pares*, which are authorised by these words of *Magna Charta*, *per legem terræ*.

I SHALL next proceed to the point of the *personal liberty of the subject*; but as it will be proper to take all that together, in one view, I shall here conclude the present Lecture.

L E C T U R E XLI.

Continuation of the commentary on Magna Charta.

HAVING explained the import of the words *per legale judicium parium suorum, vel per legem terræ*, which refer to, and qualify all the preceeding parts, it will be proper to mention those preceeding articles, and to make some observations upon them. They then consist of six different heads. The first relates to the personal liberty of the subject; the second to the preservation of his landed property; the third is intended to defend him from unjust outlawry; the fourth to prevent unjust banishment; the fifth prohibits all manner of destruction; and the design of the sixth is to regulate criminal prosecutions at the suit of the king. I shall briefly treat of all these particulars in the order in which they stand.

THE first clause tending to secure personal liberty, runs in these words; *Nullus liber homo capiatur vel imprisonetur. Liber homo*, as I before observed, here extends to all the subjects, and is not to be taken in its more restrained sense, of a freeholder. We see the words are not barely against wrongful imprisonment, but extend to arresting, or taking, *nullus capiatur*. This act extends not only to prevent private persons, particularly the great men, from arresting and imprisoning the subjects, but extends also to those from whom, on account of their extraordinary power, the greatest danger might be apprehended, I mean the king's ministerial officers, his council, nay himself, acting in person. "No man," (says my Lord Coke, commenting on this point,) "shall be taken, that is restrained of liberty, by petition or suggestion to the king, or his council; unless it be by indictment, or presentment of good and lawful men, where such deeds be done." For in that case it is *per legale judicium parium*; though an indictment found, or a presentment made by a grand jury, in one sense, cannot properly be called *judicium*, as it is not conclusive; but the fact must be after tried by a petty jury;

jury ; yet for the purpose of restraining and securing a person accused upon record, that he may be forthcoming on his trial, it is *judicium parium*. Otherwise the most flagrant offenders might escape being tried and convicted †.

IN the fifteenth chapter of Westminster the first, enacted in the third year of Edward the First, and ordained to ascertain for what offences a man might be detained in prison, and to make effectual provision for the bailing out persons upon their giving security to abide a trial, those accused of the flighter offences, persons detained *per mandement de roy* by the command of the king, are mentioned as notailable ; and this may seem to contradict the law I have now laid down. Yet, when rightly understood, it doth not. For as judge Gascoigne rightly said, the king hath committed all his power judicial to divers courts, some to one, some to another ; and it is a rule in the construction of statutes, that when any judicial act is referred to the king, it is to be understood to be done in some court of justice, according to law. The command of the king, therefore, doth not mean the king's private will, but a legal command, issued in his name, by his judges, to whom his judicial power is intrusted. Accordingly, Sir John Markham, chief justice, told Edward the Fourth, that the king could not arrest any man for suspicion of treason, or felony, as any of his subjects might ; and he gave a most excellent reason for it : Because, says he, if the king did wrong, the party could not have his action. In the sixteenth of Henry the Sixth, it was resolved by the whole court, That if the king command me to arrest a man, and I do arrest him, he shall have his action of false imprisonment against me, although I did it in the king's presence.

THE maxim, then, is, that no man shall be taken and committed to prison, but by *judicium parium, vel per legem terræ*, that is, by due process of law. Now to understand this, it is necessary to see in what cases a man may be taken before presentment or indictment by a jury ; and in the enquiry it is to be considered, that process of law, for this purpose, is two-fold, either by the king's writ, to bring him into a court of justice, to answer, or by what is called a *warrant in law*. And this is, again, two-fold ;

indeed ;

† 2 Inst. p. 46.

indeed, by the authority of a legal magistrate, as a Justice of Peace's *mittimus*, or that which each private person is invested with, and may exercise.

FIRST then, for making a *mittimus* a good warrant, it is previously necessary, that there should be an information on oath, before a magistrate having lawful authority, that the party hath committed an offence; or at least of some positive fact, that carries with it a strong and violent presumption that he hath so done: Next, then, the *mittimus* must contain the offence in certain, that it may appear whether the offence charged is such an one as justifies the taking; whether it is bailable, or such as the law requires the detention in prison. A warrant without the cause expressed, is a void one, and imprisonment on it illegal, and so it was adjudged in Charles the First's reign, though done by the secretaries of state, by the king's authority, with the advice of his council; thirdly, the warrant must not only contain a lawful cause, but have a legal conclusion, *and him safely to keep until delivered by law*; not until the party committing doth farther order, for that would be to make the magistrate, who is only *ministerial, judicial*, as to the point of the liberty of the subject; from whence might redound great mischief to the party on one hand, or to the king and public on the other, by letting an offender escape.

LET us see how far the law warrants a private person to take another; and commit him to prison. First, then, if a man is present when another commits treason, felony, or notorious breach of the peace, he hath a right instantly to arrest and commit him, lest he should escape if any affray be made, to the breach of the peace, any man present may, during the continuance of the affray, by a warrant in law, in order to prevent imminent mischief, restrain any of the offenders; but if the affray is over, so that the danger is perfectly past, there is a necessity of an information, and an express warrant; so, if one man wounds another dangerously, any person may arrest him, that he be safely kept, until it be known whether the party wounded shall die or not. Suspicion, also, where it is violent and strong, is, in many cases, a good cause of imprisonment. Suppose a felony done, and the hue and cry of the country is raised, to pursue and take the offender, any man may arrest another whom he finds flying; for what greater

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presumption of guilt can there be, than for a person, instead of joining the hue and cry as his duty prompts him, to fly from it? His good character or his innocence, how clear it may after appear, shall not avail him. His imprisonment is lawful.

ANOTHER lawful cause of arresting and imprisoning upon suspicion is, if a treason or felony is certainly done; and though there is no certain evidence against any person as the perpetrator, yet if the public voice and fame is, that A is guilty, it is lawful for any man to arrest and detain him. So, if a treason or felony be done, and though there be no public fame, any one that suspects another for the author of the fact may arrest him. But let him that so doth, take care his cause of suspicion will be such as will bear the test; for otherwise he may be punishable for false imprisonment. The frequent keeping company with a notorious thief, that is, one that had been convicted, or outlawed, or proclaimed as such, was a good cause of imprisonment. Lastly, a watchman may arrest a night-walker at unreasonable hours by the common law, however peaceably he might demean himself; for strolling at unusual hours was a just cause of suspicion of an ill intent. With respect to persons arrested by private authority, I must observe, that the law of England so abhors imprisonment, without a certain cause shewn, that if there is not an information on oath sworn before a magistrate, and his commitment thereon in a competent time, which is esteemed twenty-four hours, the person is no longer to be detained †.

SUCH is the law of England with respect to the personal liberty of the subject. Let us now see the remedies the law provides for those that suffer by its being infringed: the writ of *odio & atia* I have already mentioned, and that it is long since out of use: the most usual way then to remedy this, and to deliver the party, is the writ of *habeas corpus*, in obedience to which, the person imprisoned is brought into court by the sheriff, who is the keeper of the prison, together with the cause of his caption and detention, that the court may judge whether the first taking was lawful; and if it was, whether the continuance of the imprisonment is such; and this is brought in the name of the party himself imprisoned.

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† 2 Institut. p. 51.—55.

THE next is the writ *de homine replegiando*, of replevyng a man, that is, delivering him out upon security, to answer what may be objected against him. This is most commonly used when a person is not in the legal prison, but perhaps carried off by private violence, and secreted from his friends, and therefore may be brought by a near friend having interest in the person's liberty, as by a father, or mother, for their child, or a husband for his wife. These are the remedies for restoring a person unjustly deprived of liberty, to the enjoyment of that invaluable blessing. But very deficient would these remedies be, if there were no provisions made for the punishment of a person offending against his natural right, nor any relief for the person unjustly aggrieved.

FOR the point of punishment, an indictment will lie at the king's suit, against the false imprisoner, grounded on this statute, for the vindication of the public justice of the nation; and the party, if found guilty, shall be punished by fine and imprisonment. For the relief of the person injured, he may have an action of false imprisonment, wherein he shall recover damages; or an action on the case grounded on this statute, wherein he shall have the same remedy. For Coke observes on this statute, that it is a general rule, where an act of parliament is made against any public mischief or grievance, there is either given expressly, or else implied by the law, an action to the party injured.

SUCH is the antient original law of England with respect to liberty; and so different from that of other nations of Europe, at least, as their laws are understood and practised at present, where a man may be imprisoned without knowing his crime or accuser, or having any means, except of humble petition, to be brought to his trial. It is therefore no wonder that the people on the continent envy much the situation of the subjects of these islands, when they contemplate their own.

THE next branch of the statute is, *Nullus liber homo disseizetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*. Here it may be thought the word *liber homo* should be restrained to freeholders, because none others can be disseized; but the following words, *libertatibus* and *consuetudinibus*, lead, by their import, to a more enlarged construction, and

take in all the subjects ; so that *disseizetur* must not be taken in its limited peculiar sense, but rather in general for *deprivetur*. First, then, no freeholder shall be disseized of his freehold, but by verdict of a jury, or by the law of the land, as upon default, not pleading, or being outlawed. It was made to prevent wrongful entries, by such as had right or pretended right to the land, in order to avoid breaches of the peace and bloodshed, which often ensued thereon ; but it was not intended to take away the entry of a person who had a right to enter given him by law, for that the law could never construe a *disseizen*, which is a wrongful divesting of the freehold.

To understand this, it is necessary to observe, that a man may have right to the lands, and yet no right to enter upon them ; or he may have both ; and in the last case it is no disseizen. If A disseizes B, he shall never, by his own wrongful act, deprive B of the right of possession ; but he may of his own authority enter at any time, during A's life, provided he doth it without breach of the peace. But if A is dead, now the lands being thrown by the law upon A's heir, who had no hand in the wrong, and who is answerable to the Lord Paramount for the services due from the land, B has, by his own negligence, in not entering, or if he could not enter, claiming, during A's life, lost the right of possession ; it is transferred to A's heir, and B must recover his right by a suit at law.

To see what is meant by *libertatibus*. It comprehendeth, in the first place, the laws of the realm, that every man should freely enjoy such advantages and privileges as these laws give him. Secondly, it signifies the privileges that some of the subjects, whether single persons, or bodies corporate, have above others, by the lawful grant of the king ; as the chattels of felons or outlaws, and the lands and privileges of corporations. Hence any grant of the king, by letters patent to any person, which deprives another subject of his natural right and free liberties, is against this branch of *Magna Charta*, as are all monopolies, which were so plentifully and so oppressively granted in the reigns of Elizabeth and James the First, and here in Ireland, in that of Charles the First. We must, however, except such monopolies as are erected by act of parliament, or by the king's patents, pursuing the directions of an act made for that purpose. †.

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† 2 Inst. p. 47.

LASTLY, *Consuetudinibus* takes in and preserves those local customs in many parts of England, which, though they derogate from the common law, are yet countenanced and acknowledged as part of the general system of law. It also extends to any privileges which a subject claims by prescription, as wreck, waif, stray, and the like †.

THE next clause is, *aut utlagetur*; of which having spoken already, I shall pass on to the fourth, *aut exuletur*. No man shall be banished out of the realm, *nisi per legem terræ*; for the *judicium parium* is out of this clause, there being no crime of which a man is convicted, whose sentence is banishment. The *transportation* now commonly used for slighter felonies is not like it; for that is by the free consent of the criminal, who desires to commute a heavier punishment for a slighter. Now *per legem terræ* a man may be exiled two ways, either by act of parliament, as some wicked minions of our former kings were, and particularly Richard the Second's corrupt judges into Ireland; or by a man's abjuring the realm when accused of felony, that is, swearing to depart out of the kingdom, never to return; which latter is long since fallen into disuse. Coke says, that the king cannot send any subject against his will to serve him out of the realm, and the reason is strong; for if he could under pretence of service, he might tear him from his family and country, and transport him to the remotest corner of the earth, there to remain during the whole of his life ‡. But what shall we say as to the military tenants, who by the very tenure of their grants were obliged to serve the king in his wars out of the realm? Certainly, whilst the feudal system retained its pristine vigour, and personal service was required, they were an exception to this rule; but when the commutation of *escheage* was established, they were considered as under it. Indeed their general readiness to attend their king's service in person, gave no occasion for this question's ever being decided. The famous case on this point was in Edward the Third's reign; that prince had made many grants to Sir Richard Pembrige, some for *servitio impenso*, others for *servitio impendendo*. The king commanded him to serve in Ireland, as his Lord-deputy, which he positively refused to do, looking upon the appointment as no better than an exile;

† 2 Inst. p. 47.

‡ Ibid.

exile ; and for this refusal the king seized all that had been granted to him *pro servitio impendendo* ; and the question came on in court, whether the seizure was lawful. The judges clearly held the refusal lawful, and therefore would not commit him to prison ; but as to the seizure, in consequence of the words *pro servitio impendendo*, without specifying where, they thought it justified. But Coke says, “ it seemeth to me that the seizure was unlawful.” For *pro servitio impenso*, and *impendendo*, must be intended of lawful service within the realm. The last time this act was violated was in the reign of the misguided James the First, in the case of the unfortunate Sir Thomas Overbury ; who for refusing to go ambassador to Muscovy, was by that prince sent to the Tower, in which place he was afterwards barbarously poisoned ; and for his murder the favourite Somerset and his counsellors were both condemned to die †.

† 2 Inst. p. 48.

L E C T U R E XLII.

Continuation of the commentary on Magna Charta.

THE fifth branch of this statute is in very general terms; it is, *aut aliquo modo destruat*. “Destruction” is a word of very general import. Coke, in the first place, explains it by saying, “no man shall be forced of life or limb, or put to the torture or death, without legal trial.” But he shews, afterwards, by his instances, that it is much more extensive: For he observes, that “when *any thing* is prohibited, *every thing* is prohibited which necessarily leads to it.” Every thing, therefore, openly and visibly tending to a man’s destruction, either as to life, limb, or the capacity of sustaining life, is hereby directly forbid: So that, *torture*, as it endangers life and limbs, and may prevent a man from earning his livelihood, is, on all these three accounts, unlawful, though common among all other nations of Europe, who have borrowed it from the old Roman law with respect to slaves; a plain indication in what light the introducers of it looked on their subjects. It cannot be said that this hath never been violated in England in arbitrary times; (as what nation is there, whose fundamental laws have not been, on occasion, violated?) yet, in five hundred years, I do not believe the English history can afford ten instances†.

For the same reason, “judging a man, either in a civil or criminal cause, without calling him to answer and make his defence,” is against this provision. So likewise is “the not producing the witnesses, that the party may have an opportunity to cross-examine them,” I believe, if they may be had. For in the case of death, or absence in a foreign country, that they cannot be produced, there is an exception, for very necessity’s sake; and in that case, the examination of such person, taken before a proper magistrate, is good evidence, tho’ thereby the party loses the cross-examination or information against the murderer. But whenever this happens, the
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† 2 Inst. p. 48.

jury should consider that the party has lost the benefit of the cross-examination, and have that in their contemplation, when they are preparing to give their verdict. Directly contrary to this fundamental law, and to common justice, was the trial of Sir Walter Raleigh, conducted by Coke, attorney-general, upon the depositions of people who might be brought face to face. For, notwithstanding the perfect knowledge of that great lawyer in the laws of England, he was a most time-serving minister of the crown. The people of these nations are much indebted to him for his excellent writings on the law, and more for demonstrating the antient right of the people of England to the liberties they claimed: But, if we consider that he was then in disgrace at court, I fear this panegyric must be confined to his behaviour while a judge, which was without reproach; nor did he hesitate to forfeit the favour of the crown, by opposing incroachments on the law of England.

As *tending to destruction*; it is likewise unlawful to amerce or fine a man convicted of a crime, beyond what he has a possibility of paying; for that would tend to perpetual imprisonment, and disabling him from maintaining himself and family. Neither is it lawful, tho' a man be indicted of treason or felony, for the king to grant, or even to promise, the forfeiture of his lands or goods; for this would be throwing a temptation in the way of others to suborn witnesses to his destruction. These I mention, only as particular instances, to open the import of this law; but the words are *aliquo modo destruatur*, taking in "every thing that directly tends to destruction." And it must be observed that these words, *aliquo modo*, are not in any other branch of this act.

I COME now to the last clause of this first part, *nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, aut per legem terræ*. I observed before, from the words here being in the first person, that they refer to the suit of the king; and they relate not only, by the latter words, to a legal trial, as to matter and form, but also to a trial in a proper and legal court. The words *nec super eum ibimus* belong to the King's Bench, where the suits of the king, the *placita coronæ*, are properly handled, and where the king is always supposed to be present. The words *super eum mittemus* refer

refer to other courts sitting for the same purposes, as Justice of gaol-delivery, for instance, under the king's commission. But when those words are coupled with the following ones, *per legem terræ*, they carry a farther import; not only that the courts, trying the king's causes should proceed according to the law of the land, but that the courts themselves should be such as the *lex terræ* authorizes; that is, either the common law, from time immemorial, or acts of parliament. So that the king hath no power, of his own authority, to form new criminal courts, as he may civil ones. In some cases, he appoints, indeed, the judges of the courts of common law, and issues commissions, and appoints the commissioners in criminal courts authorized by parliament; but no farther doth his power extend.

To this it may be objected, that the king may create a county palatine, and consequently new criminal courts; but let this be considered: Counties, and duchies, such as we call *palatine*, were, I may say, indeed of the essence of a feudal kingdom, as ours originally was; that is, the king might dismember a part of his kingdom from the immediate subjection to the crown, transfer a subordinate degree of the legal rights to a subject; and when a county of that kind was created, without saying any more, all the courts, not new ones, but the same that were at common law through the whole kingdom, followed as incidents; in the same manner as by erecting a new county, not palatine, it had its county-court, and the sheriff's tourne. These are not erecting, properly speaking, new courts, so much as bringing the old ones home to the doors of the people of that district.

As I observed at the beginning, this law naturally divides itself into two parts, the first ending at the words *per legem terræ*. Having made such observations as have occurred to me as necessary or material for the understanding thereof, I now proceed to the latter part of this statute, which runs in these words: *Nulli vendemus, nulli negabimus, aut deferemus justitiam, vel rectum*. Some have imagined that, by these words, in the disjunctive, are meant common law and equity; but courts of equity, and proceedings in cases of equity in those courts, were not known in times so early; and the legal signification of *rectum* in old statutes, and law-books, is either the right that a man hath to a thing, or the law of the land, the means of attaining the possession and enjoyment of that right; and in that sense it is

here to be taken ; as Coke says, *justice* is the end, *rectum* the means, namely, due process of law ; neither of which is to be sold, denied, or delayed to the subject. In order to understand this, it will be necessary to point out some of the mischiefs that were before this act, which is the surest way to expound the meaning of any law †.

For this purpose it is to be remembered, that, in the Saxon times, almost all suits, except between grandees, were expedited in the county-courts. I have observed before, that the Conqueror and his successors discouraged these, and encouraged suits in the *Aula Regis*, or king's courts ; and that the subjects were fond of suing there ; but still it was a matter of favour, where the cause properly belonged to the country jurisdictions, and could not be demanded as a right. As a matter of favour, it might be denied by the king, or his chancellor, who was the issuer of the original writs, unless a sum of money was paid, such as they demanded. This was *selling* justice. Or, if the person to be sued was a favourite of the king, or chancellor, the writ might be denied ; this was *denying* justice. Or, if it was granted, as the proceedings were *ex gratia*, the party might, *ad libitum*, be delayed by the judges, or the cause might be stopped by order of the king, and this was the *deferring* of justice, meant by this act, which was intended for the giving every subject a right, in all cases, and against all persons, to have justice administered to him in the king's courts. The chancellor now is hereby obliged instantly to issue all original writs, and the judges of the several courts, where causes depend, to issue the proper judicial ones without fee or reward. This, however, is not so to be understood, as to prohibit the moderate and accustomed fees, which, from time immemorial, have been paid to the officer, for his trouble in making them out, or to the judge, for putting the seal ; for these are a part of their livelihood, but only those arbitrary sums which were before taken, and which the state properly calls the *selling* of justice. So likewise the judges are obliged, in every cause before them, to proceed with expedition, and to suffer no delays, but such as the law allows, and requires, for giving each party an opportunity of defence, and of laying his cause fully before the court.

HOWEVER,

† 2 Institut. p. 55, 56.

HOWEVER, notwithstanding this act, the evil was often repeated, and many suits stopped by the command of the king, and others, as appears by four several acts of parliament, made to enforce and explain this one, the substance of which acts, is summoned by Coke in these words: That “ by
 “ no means common right, or common law, should be disturbed or de-
 “ layed; no, though it be by command, and under the great seal, or privy
 “ seal, order, writ, letters, message, or commandment whatsoever, either from
 “ the king, or any other; and that the justices shall proceed, as if no
 “ such writs, letters, order, message, or other commandment, were come
 “ to them.” However, this is not to be understood so strictly, but that the king may stop his own civil suit that he hath instituted for his own benefit, as a *capias* for a fine, because *quisque juri suo renunciare potest*; and this stoppage, in truth, is for the benefit of the subject. It is otherwise in criminal accusations, unless he can shew good cause to the court to put it off. For every man accused has a right to be brought to his trial †.

NEITHER are legal protections within the prohibition of this law; these were granted to stop suits against any man that was personally employed in the service of the king, and were founded on this presumption, that such service was for the public benefit, to which all private regards must give way. But then these protections, must be legal ones, such, and none other, as are found in the Register, the antientest book of the law, and not ones newly devised, and for new-fangled causes. These protections, however, were greatly abused in the sequel; favourites, and their dependants, frequently obtaining them, to hinder others of their just rights, under pretence of serving the king; where in truth, there was no such thing. It is therefore recorded, highly to the honour of Elizabeth, that she first discontinued the granting them; and her laudable example has been followed by all her successors. I shall, therefore, not dwell upon them, it being sufficient to have mentioned that such things there are, or at least *were* in our law.

I HOPE the prolixity with which I have treated of *this* chapter of *Magna Charta*, the care I have taken to open the true meaning and force of every word in it, and the many tacit exceptions each part of it is subject to, will be excused, when it is considered, that it not only contains great variety of

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matter,

† 2 Institut. p. 56.

matter, but is the most important, and of more general consequence and concern, than any other law of the land. It is the guardian of the life, the liberty, the limbs, the livelihood, the possessions, and to the right to justice of every individual, and therefore it concerns every man to know it, and fully to understand it.

THE thirtieth chapter is in favour of commerce and merchant strangers. Certain it is, that, in antient times, the kings of Europe, and their military subjects, looked on merchandize as a dishonourable profession; as did the Romans also, in the military ages of that republic. By the old laws of England, no merchants alien were to frequent England, except at the four great fairs; and then were permitted to stay but forty days at a time, that is, an hundred and sixty days in the whole year. But now this act has altered the former law, and is very favourable to persons engaged in commerce, who before were little better than at sufferance. It commands, that all merchants, namely, merchant strangers, whose sovereign is in amity with the king, unless publicly prohibited, that is, says Coke, by Parliament, which is true, as the law hath since stood, (but before, I conceive the king himself had the power to prohibit) shall have safe and sure conduct in seven things. First, to depart out of England without licence, at their will and pleasure. Secondly, to come into England in the same manner. Thirdly, to continue in England without limit of time. Fourthly, to go and travel through any part of England at their pleasure, by land or water. Fifthly, free liberty to buy and sell. Sixthly, without any manner of evil, tolls or taxes; but only, Seventhly, by the old and rightful customs, that is, by such duties as were of old time accustomed to be paid, and are therefore called *Customs*. By this law the king is prohibited from laying any new taxes on the imports or exports of merchant strangers. And as now they gained a general licence to continue in the realm, from hence arose that privilege of merchant strangers to take leases for years, of houses for their dwelling, and warehouses for their goods, whilst they continued in England; for, regularly, all acquisitions of aliens, in lands or tenements, belong to the king †.

THE

† 2 Institut. p. 57. et seq. Barrington on the statutes. p. 23. 25.

THE second branch of this act is a very equitable one. It concerns merchant enemies, or rather such merchant strangers as came in friends, and afterwards became enemies, by a war's breaking out between the sovereigns while they are in England. It provides that, on a war's so breaking out, the persons and effects of such merchants should be seized, and safely kept till it should be known how the English merchants had been treated in the enemy's country; and that, if they were well treated, these should be so too. This regulation, however, is not put in use; because, by the treaties made between the sovereigns of Europe, it is stipulated, that, on the breaking out of war, the merchants in each others country should have a certain number of days to withdraw themselves and their effects. But if a merchant enemy comes into the country, after war declared, he is to be treated as an enemy; to which, by the old law, now antiquated, there was a very humane exception, that of persons driven into England by stress of weather.

LECTURE

LECTURE XLIII.

Continuation of the commentary on Magna Charta.

AS I have dwelt on the twenty-ninth chapter of *Magna Charta* so long, and treated of it and every part of it so minutely, I shall, in this lecture, dispatch the remaining part thereof with more expedition. Indeed, of the thirty-first I would have said no more, than merely to observe, that it related to the military tenures now abolished, were it not proper to remark, that it was made to enforce the old feudal law, then the law of England, with respect to landed estates, and to restrain John's successors from the violences he had introduced in favour of the royal prerogative, to the detriment of the immunities and privileges of the subjects. It has been already observed in these lectures, that by the feudal law, especially as established by the Conqueror in England, the king was very amply provided for with a landed estate, to support his dignity and expences, which was at that time looked on all over Europe as unalienable, except during the life of the king in being; and that the rest of the land was to be the property of the free subjects of the realm, subject to the services imposed, and the other consequences of his feignory as feudal lord.

ONE of these consequences was the escheat on the failure of heirs, either by there being none, or by the blood being corrupted by the commission of felony, which in law amounted to the same thing; as no son, uncle, nephew, or cousin, could by law claim as heir by descent to a person attainted. For the legal blood, the title to the inheritance, failed in him the last possessor, by his breach of fealty; and every heir lineal or collateral by the law of England being obliged to claim as heir to the person last seized, must be excluded, when the legal blood inheritable failed in the last possessor.

IN consequence of these escheats, which often happened in those times, both by corruption of blood, and failure of heirs inheritable, (for, as I have

have observed before, the granting *feuda antiqua ut nova* was introduced only by Henry the Second, the father of John, and were not at this time become universal, as they since have been) John introduced this new maxim, that when an earldom or barony fell to the crown by escheat, he held it in the right of his crown, as it was originally derived from thence; and consequently, that the tenants of the former lord, being now, instead of *intermediate*, become *immediate* tenants of the crown, held of him *in capite*, as it was called; that is, that he, by this escheat, obtained privileges over the tenants of the former lord, which he, the former lord, never had, or could have, but which he claimed as king, *in jure coronæ*. These privileges were many in number; but it will be sufficient to mention only two of them, to shew into how much worse a state the tenants of these escheated lordships were thrown, by being considered as tenants *in capite*.

FIRST, then, the king had from his tenants *in capite*, who came into possession of their lands at full age, instead of *relief*, to which subject lords were intitled, and which was only one fourth of the value of the lands, his *primeir seizin*, which was the whole year's value. Another grievance was with respect to the wardship of military tenants under age. As to the tenants *in capite*, the king had, by his prerogative, a right not only to the wardship of the person of his minor tenant, and of the lands he held of him *in capite*, but also of all other lands held by knight-service of any other person. For as to socage lands, they were to be in the hands of the next of kin, to whom the inheritance could not descend, who, at the infant's full age, was to be accountable for the profits: and under the pretence of such tenants, upon the superior lord's escheat, becoming tenants *in capite*, John claimed and exacted the privilege, to the detriment of the other lords. These and other mischiefs, for others there were, as I observed before, and some of them are mentioned in this statute, are remedied by the general provision which restored the feudal law, that the king should hold all such escheated lordships in the same right they were before held, and have no other privilege, but what the lord by whose escheat they fell to him had: in a word, that he should hold them as lord of that lordship, not as king †.

THE

† 2 Institut. .p. .64..

THE thirty-second chapter relates to the alienation of lands, and gives a qualified power of that kind. By the feudal law, as it was introduced at the Conquest, no lord could alien his feignory without the tenants consent, so neither could the tenant his tenancy, without approbation of the lord. These strict rules were first broken into, in those superstitious times, in favour of churchmen; afterwards, in Richard the First's time, to raise money for the holy war. Not but the subjects, by their insisting on Edward the Confessor's laws, of which free alienation was a part, seemed to be fond of it. However, the kings, in all their grants of the old English laws, were careful to preserve the feudal system, in guarding against the alienation of the military tenures. Coke, on commenting in this statute, in order to the better understanding thereof, makes three observations relative to what was the common law before this statute; in the last of which I apprehend he is mistaken, as the law then stood; and that what he asserts therein to have been law did not become (so though often in practice) till after the statute *quia emptores terrarum*, in Edward the First's reign.

His first observation is, that the tenant might have made a feoffment of the whole, or a part of his tenancy, to hold *of himself*; and no doubt but he might. This was the usual case of subinfeudation, by which the lord was in no sort prejudiced; for his feignory remained entire, and he might distrain in any part for his whole service; and in such case, if the under tenant was aggrieved, he was to have his remedy against his immediate landlord the *mesne*, (or middle person), as he is called in our law.

THE second observation is, that the tenant could not alien in fee *apart* of the tenancy, to hold, not of himself, but of the lord, than which nothing could be more reasonable; for it would have been against these old rules also, for a tenant to bring in another, as immediate vassal to the lord, without his the lord's consent. The tenant would by that means dismember the feignory, which he received, entire, and so deprive the lord of his right of distraining in the whole, and confine him merely to that part remaining in his own hands, as original tenant. For as to the part of the *allienee*, he could not distrain that for his service, there having been no feudal contract between them. Such alienation, therefore, unless when the lord accepted the *allienee* as a tenant, was a breach of fealty, and against the old feudal principles, and consequently unlawful in England.

THE

THE third observation Coke makes on this statute, is, that by the common law the tenant might have made a feoffment of the whole tenancy, to be holden of the lord. For, says he, that was no prejudice at all to the lord †. But though this certainly prevailed as common law, long before either Coke or Littleton wrote, I cannot help thinking, both because it was contrary to the old feudal law, and also from the words of the statute *quia emptores terrarum*, that it was first introduced by that act of parliament, the words of which are, *de cætero liceat unicuique libero homini terras suas, seu tenementa sua vel partem, inde vendere*. Here the alienating the whole is declared from henceforth lawful; which words had been nugatory, if this had been common law before.

THE chapter of *Magna Charta* of which we are speaking, was, then, the first positive law that allowed the free alienation of lands. It, in one sense, enlarged, whilst in another it expressly restrained, the power of the tenant; whereas, before, he might alien the whole, or part of his tenancy in fee, but subject to the distress of the lord. Now, by this statute, he was confined to an alienation only for so much, that, out of what remained, the lord might have sufficient distress for his entire service, and the part conveyed was in the *alienee's* hands, free from any future distress by the lord, or service due to him, fealty only excepted. But it not being specified, how much of the land was a sufficiency, though the half, or what was the half in value, was, in common estimation, reputed such, the tenants, under this pretence, would alien more; which gave occasion to many disputes and suits, and the propensity to general alienations continuing, the law called *quia emptores terrarum*, already mentioned, was at length made, which gave a general licence to alien the whole, or a part at pleasure, to hold of the superior lord; and this put an end, in the law of England, to subinfeudation of fee simples. For, since the passing that law, if a man infeoffs another of the whole or part of his land, there is no tenure between the feoffor and feoffee, but the feoffee holds of the feoffor's lord. But as to lower estates, as fee tail estates for life, years, or at will, subinfeudation remains; because the whole estate is not out of the donor, or lessor, but a reversion remains in him; wherefore the tenure, in such case, is of the donor or lessor.

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† 2 Inst. p. 65.—67.

By the statute of *Magna Charta*, in case of alienation of part, to hold of the lord, the residue remaining in the original tenant's hands, was to answer the services, and the *alienee* held of the lord, by fealty only. But now by the second chapter of the forementioned statute, the services were to be apportioned, that is, divided in proportion to the value of the lands. If half of the lands, not in *extent*, but *value*, was aliened, the *alienee* paid half: if one third, the like quantity. I have observed before, on this statute of *quia emptores*, that the king, not being named, was not bound by it. For his tenant *in capite* to alien without licence was a forfeiture, until, in the reign of Edward the Third, a fine for alienating was substituted in the place of the forfeiture, which fine continued until the restoration, when it was abolished.

THE thirty-third chapter provides, that the patrons, that is, the heirs of the founders of abbeys, who, by title under the king's letters patent, or by tenure, or antient possession, were intitled to the custody of temporalities, during the vacancy of the abbey, should enjoy them free from molestation of any person, or of the king, under the pretence of the prerogative †.

THE thirty-fourth chapter is relative to appeals of murder, brought by private persons. When a man is murdered, not only the king, who is injured by the loss of a subject, may prosecute the offender, but also the party principally injured, that is, the widow of the deceased, if he had one; for she, as having one person with him, stands intitled to this remedy in the first place; but if he left no widow, his heir at law might pursue it. It follows, therefore, that a female heir might, by the common law, have brought an appeal of murder, as the daughter, or the sister, if there had been neither children or brother. But this statute alters the common law, and takes away the appeal, in such case, from every woman, except the widow; so that, at this day, if a man be murdered, leaving no widow, and his next heir be a female, no appeal of murder can be brought. But this disability is personal to women; for though a daughter or sister, living, can bring no appeal, though heir, yet, if they be dead before the murder, leaving a son who is heir, he may bring it ‡.

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† 2 Inst. p. 68. Barrington, p. 25.

‡ Ibid. p. 68. 69.

I SHALL now make a few observations on the right of the widow's bringing such appeal. First, then, the man slain must be *vir suus*, as the statute expresses it. If, therefore, they had been divorced, the marriage being dissolved, she could not have an appeal. It was otherwise, if they had been only separated *a mensâ & thoro*; for then he still continued her husband. He ceases likewise to be *vir suus*, if she ceases to be his wife, or widow. Therefore, by her marrying again, her appeal is gone, even though the second husband should die within the year, the time limited for bringing it. This is carried so far, that though she brings an appeal while a widow, yet if she marries while it is depending, it shall abate for ever. So if she has obtained judgment of death against the *appellee*, if she marries before execution, she can never have execution against him. In one point the heir is less favoured in appeals than the widow; for if the person murdered had been attainted of high treason, or felony, so that his blood was corrupted, the heir could not have it; for the civil relation between them was extinguished, by the ancestor's civil death: but the relation of husband and wife depends on the law of God, who has declared the bond indissoluble; therefore no law of man can make him cease to be *vir suus*, and, in such case, she shall have an appeal.

THE thirty-fifth chapter treats of the county-courts†; but having already, in a former lecture, mentioned what appeared to me sufficient on that subject, I shall proceed to the next, *viz.* the first law made to prevent alienations in mortmain. Lands given to a corporation, whether spiritual or lay, are said to fall into *mortmain*, that is, into a dead hand, an hand useless and unprofitable to the lord of the fee, from whom he could never receive the fruits. There could be no escheat, either for want of heirs, or felony, because the body never died, nor was capable of committing felony. For the same reason of its never dying, there could be no wardship, or relief; neither could there be marriage. But besides the loss to the lords, the public also suffered; for the military service the lands were subject to, were often withdrawn, or, at least, very insufficiently performed.

THESE alienations, without the consent of the superior lord, were directly against the feudal polity; yet such was the power of the clergy, who were

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† 2 Inst. p. 69. 74.

the principal gainers thereby, in those ages, and so great their influence, that they were not only tolerated, but universally practised, through all Europe; for the founding of a monastery was the usual atonement for the most atrocious crimes. In England, particularly, from the accession of the Conqueror to that of John, containing one hundred and thirty-four years, there were no less than an hundred and four monasteries founded, many of them very richly endowed, besides particular benefactions made to them and the old ones. No wonder, then, it was found necessary, by laws, to put a stop to the growing wealth of the church; but the reign of John, a vassal to the Pope, was not a time to expect a remedy. Accordingly, this act goes no farther than to remedy a collusive practice, by which a vassal, to defraud his lord of the fruits of his feignory, made over his lands to a convent, and took it back to hold from them; and to that end, the statute declares the land, in such case, forfeited to the lord.

I SHALL say no more on this point, nor of the many cunning practices churchmen, in after times, put in use by the advice of the most learned lawyers they could procure, in order to creep out of this, and every other statute made to restrain them, and for employing which, Coke says, they were much to be commended. But he has forgot to tell us whether he thought those great lawyers deserved commendation, for finding means to elude the most beneficial laws of the land. It will be enough here to say, that, from these devices, arose, in time, the wide-spreading doctrine of *uses and trusts*, which have over-run our whole law, and that the judicial powers of courts of equity have grown with them †.

THE next chapter was made to restrain the intolerable exactions of *escuage* which John had introduced, and forbids the assessing it, in any other manner than was used in the time of Henry the Second, his father, that is, as I observed under that reign, very moderately; so that every man had his option, whether he would serve in person, or pay it ‡.

NEXT comes the thirty-eighth, which is the conclusion. First, it saves to the subjects all other rights and privileges before had, though not mentioned

† 2 Inst. p. 74, 75. Barrington, p. 27.

‡ Ibid. p. 76. See also 1 Inst. lib. 2. cap. Escuage. Barrington, p. 28.—31.

tioned herein. Coke observes, that there is no saving for the *prerogative of the king*, or his heirs; for that would have rendered all illusory. Secondly, it ordains that the king and his heirs should observe it. Thirdly, that all the subjects should. Fourthly, it recites, that, in consideration hereof, the king received from the subjects a grant of the fifteenth of their moveables. For *Magna Charta* is not merely a declaration of the old laws, but alters them in many instances; for which favourable alterations the subjects made this grant, and thereby became purchasers of them. Fifthly, it prohibits the king, and his heirs, from doing any thing whereby these liberties might be infringed or weakened; and declares all such doings null and void. Lastly, comes the alteration of twelve bishops, and nineteen abbots, and thirty-one earls and barons †.

† 2 Inst. p. 76.—78.

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